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In the

# Supreme Court of the United States

October Term, 1929

No. 19

ALEXANDER SPRUNT & SON, INC., ET AL,
*versus* *Appellants,*
THE UNITED STATES OF AMERICA, ET AL,
*Appellees.*

*On Appeal From the District Court of the United States for the Southern District of Texas, Houston Division.*

## Brief for Appellees, Arkansas Cotton Trade Association, Oklahoma State Cotton Exchange, Galveston Cotton Exchange, and Texas-Oklahoma Compress & Warehouse Association, Intervenors


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## STATEMENT OF THE CASE

This case involves the validity of an order of the Interstate Commerce Commission requiring the carriers

participating in the movement of cotton to the Gulf ports to remove the discrimination found to exist as between the export and domestic rates on cotton by establishing certain specific rates prescribed by the Commission for those movements.

The circumstances which finally resulted in the investigation and order of the Commission here involved date back to a controversy between the common carriers operating wholly within the state of Texas, on the one hand, and the Railroad Commission of Texas, on the other. For a great many years the so-called domestic rates on cotton from Texas interior points to the Gulf ports for local application were exactly the same as the rates for export or coastwise ship movement; that is, there was one rate to the ports for application in connection with the export movement of cotton and for domestic movements alike. Up to the year 1910, the rate prescribed by the Texas Railroad Commission was applied to the water-front, and there was no difference between the export and the intrastate domestic rate. In 1910, the Texas Commission made a reduction in its rate from 55 cents to 51 cents per 100 pounds. The railroads refused to apply to the movement of cotton to the shipside the rates prescribed by the Texas Commission, and thus continued in effect a 55-cent export rate in conjunction with the 51-cent domestic rate. That condition obtained for a short period of time, when the export and domestic rates were again equalized. They remained the same until September 18, 1917, at which time the railroads

again published an export rate higher than the rate applicable in connection with the domestic movement. Therefore, from 1890 to 1917, except during a short period in 1910, the export rates from points in Texas to the ports were the same as the domestic rates. (R. 324-25). About the time the carriers were preparing to publish the dual system of rates for application in Texas, they also published a similar system of rates for application from points in Louisiana to the Louisiana ports. The Louisiana rates were suspended by the Interstate Commerce Commission in *I. & S. Docket 955, Louisiana Cotton Case, 46 I. C. C. 451*, and in passing upon the proposed schedule the Commission stated its purpose at page 463 of that decision:

> "Under the normal adjustment of rates as between local delivery and shipside delivery, or for export, the rate for the latter would be 53 cents. The proposed rate is 52.5 cents, which is the rate on export cotton to New Orleans from Texarkana, Dallas and other Texas points, and, under the fourth section, can not be exceeded. The respondents have shown that unless the rates from Louisiana points to New Orleans for export exceed the rates to the same place for local delivery by not more than 3 cents injustice to the interior points will result. The converse is true as to rates for export that exceed the local rates by less than 3 cents, and any diminution in this spread is an advantage to the interior points and a disadvantage to New Orleans. To that extent we find that the rates from Shreveport and from other points taking similar rates to New Orleans proper under

the proposed adjustment should be reduced in order to preserve the spread of 3 cents. In other words, when the rate for shipside, or for export, is 52.5 cents the rate for depot delivery should not exceed 49.5 cents."

It is to be observed that the reason for the dual system of rates, as stated by the Commission, was to equalize port concentrators with interior concentrators. The Commission stated that any diminution in the spread between the export and the domestic rates gave to the interior points an advantage and created a corresponding disadvantage to the concentrators in New Orleans. In other words, the dual system of rates, whereby a higher rate is applicable to export commerce than in connection with domestic commerce, was for the purpose of equalizing port concentrators with interior concentrators in the transportation cost of reaching shipside.

The dual system of rates, as established in Texas and as approved for application at Louisiana ports by the Interstate Commerce Commission in the *Louisiana Cotton Case*, subsequently came before the Commission for consideration in connection with the rates on cotton from other southwestern states to practically all of the Gulf ports. In the case of *Galveston Commercial Association vs. Alabama & Vicksburg Railway Co., 77 I. C. C. 388*, at pages 412 and 413, the Commission considered the question of establishing export rates higher than the domestic rates, and cited with approval the

quotation above made from the *Louisiana Cotton Case.* At page 413, the Commission expressly stated that the purpose of the dual system was to establish a uniform basis of fixing export rates on cotton from the Southwest to New Orleans and the Texas ports, and further specified that the export rates should exceed the domestic rates by the amount of the charge made for moving the cotton from the concentration points at the ports to shipside. The Commission stated, also, that the reason for establishing that difference was to eliminate the discrimination pointed out at page 463 of the *Louisiana Cotton Case, supra.*

Under that system of rates the situation was substantially as follows: A concentrator at Dallas could collect his cotton into shipping lots, and have it forwarded to shipside on a through bill of lading marked for export at the rate of 83.5 cents. A port concentrator could purchase cotton at Dallas, move it to the port on the domestic rate, and, after concentration and merchandising, redeliver it to the carrier as an outbound shipment, pay the cost of switching from his facility to the waterfront, and make a claim on the carrier for the application of the through export rate from Dallas to shipside. The carrier would thereafter readjust the charges collected under the domestic rate into the port and the charges collected for the movement from the port concentrator's facility to shipside, and settle with the shipper on the basis of the through rate of 83.5 cents, from Dallas to shipside, in the manner described by this court in *Atchison, Topeka &*

*Santa Fe vs. United States, 49 Sup. Ct. Rep. 494,* at page 498, and in *Central Railroad of New Jersey vs. United States, 257 U. S. 247.*

The cost of moving cotton from the warehouses at the port to shipside, plus the inbound domestic rate, substantially equalled the export rate from interior points of origin to shipside. Therefore, in actual practice, the port concentrators did not avail themselves of the concentration privilege, but simply paid the inbound domestic rate and absorbed the outbound switching cost or drayage cost to the water-front in lieu of filing concentration claims. In either event the respective costs of reaching shipside, for both port concentrator and interior concentrator, were substantially equal.

The Exhibit A-121, before the court in its original form, serves well to illustrate the situation. That exhibit has been reproduced herein as Appendix "A". An examination of Appendix "A" will show that the application of the dual-rate plan produces the following results: Cotton coming in from interior points would reach the yard shown at symbol (5). There the line-haul trains would be broken, and the cotton would be switched to the various facilities located at symbols (F), (G), (H), (K), (M), (O) and (J). After concentration and merchandising, the carriers were obligated under the tariffs to move the cotton from symbols (F), (G), (K) and (O), a distance of approximately 5 to 7 miles, to the wharves located between the symbols (7) and (8). A shipment of cotton moving on a through

bill of lading from interior points going to shipside would move in the line-haul train to symbol (5), and there be broken up in the same manner as a domestic shipment. That shipment would also be switched through the terminals shown at (F), (G), (H) and (K), and thereafter would be switched to the shipside wharves between symbols (7) and (8).

It will be observed from this description that cotton going to the uptown warehouses on the domestic rates received less service to the extent of the distance from uptown to the waterfront than the cotton going on a through bill of lading to the wharves; but after the cotton was concentrated at the uptown facilities (F), (G) and (H), and then transported from there to the waterfront, the total transportation in each instance, assuming that delivery would be made at the same wharves, would be substantially the same. It is obvious, therefore, that the system of rates fixed by the Commission in the *Louisiana Cotton Case, supra*, and in the *Galveston Commercial Association Case, supra*, did result in substantially equal total charges for substantially equal total services under the conditions which obtained at that time.

It is also true that there were, and still are, certain warehouses, handling cotton under the concentration arrangements accorded up-town facilities, which were situated at such distances from the wharves that the service from such warehouses would be greater than the service direct to the wharves or the service through

up-town facilities. For instance, on Appendix "A," symbol (V) represents the Clinton compress. It is obvious from a glance at the map that a shipment coming in at symbol (5), moving through the yards at symbol (0) thence to the Clinton compress for concentration, and after concentration moving from symbol (V) to the wharves between symbols (7) and (8) would receive a greater service from the carrier than in the case of shipments direct from the interior to the wharves or shipments through the facilities at (F), (G) and (H) to the wharves. The facts are, however, that the great bulk of the cotton was handled at the facilities located similarily to the facilities at symbols (F), (G) and (H), and that, at both Houston and Galveston (see Exhibit 189, Record 230), a substantial equalization existed as between port concentrators and interior concentrators.

That equalization was maintained, to the apparent satisfaction of both classes of shippers, until the construction of a warehouse for the concentration and merchandizing of cotton immediately at shipside on the pier at Galveston. From that warehouse cotton could be delivered directly to the shipside wharves without the necessity of additional rail transportation because of the provisions in the ship's contract which obligated the outbound vessels to accept the cotton moving to foreign destinations at any point on the wharves within 200 feet of the ship's tackle. This distance of 200 feet actually extended from the water line of these water-front warehouses to as much as one-third of the way across the interior of the water-front warehouses

(R. 45). Thereafter, a similar shipside facility was constructed at Houston, as shown by Appendix "A", symbol (P) and further illustrated by Appendix "B". This facility is referred to as the Anderson-Clayton Plant, and is operated under the name of the Houston Compress Company. The construction of these warehouses at water-side made it possible to have cotton actually delivered within hand-trucking distances of shipside, upon the domestic rates, 3.5 cents less than the export rate, as a result of the fact that the interstate rates, and the intrastate rates established by the Texas Railroad Commission, were applicable for delivery at shipside. Circular 401, dated March 16, 1897, which was still in effect at the time this controversy was under investigation, required the carriers to deliver cotton upon the wharves at the domestic rates. (R. 185). It was shown of record, for instance, that the carriers were actually transporting cotton from interior points and making delivery upon the wharves at shipside which had been, previous to the delivery thereof to the rail carrier at interior points, booked for delivery to a particular steamer docked at the particular wharf where delivery was made by the rail carrier at the ports, and on such cotton the carriers were collecting the domestic rates instead of the export rates. The actual booking for foreign commerce had been made prior to the delivery to the rail carrier. (R. 201).

Referring again to Exhibit A-121, it is obvious that a concentrator located in the vicinity of (F), (G) and

(H), moving his cotton on a domestic rate of 80 cents, for instance, which rate was also applicable in connection with a movement to the wharves located between symbols (7) and (8), was receiving less transportation service than would be involved in connection with the movement of the same cotton direct to the wharves. It is also obvious that the cost of moving the cotton from symbols (F), (G) and (H), to the wharves located between symbols (7) and (8), would be an additional cost over and above the amount of the domestic rate, and, therefore, resulted in a disadvantage to the uptown, or back-of-the-water-front facilities. The situation in connection with the shipments concentrated at an interior point was not different in any way from the situation described in connection with the facilities located at (F), (G) and (H), except that, in connection with the cotton concentrated at interior points, less service would be performed by the carrier than in either of the instances referred to above, namely, direct delivery to the wharves or delivery through the facilities at symbols (F), (G) and (H).

In connection with interior concentrated cotton moving on a through export bill of lading or on a bill of lading marked for export, such cotton is moved direct through the terminals at the port to the shipside facilities and is delivered to the wharves of the outgoing vessels by the carriers and the cost of unloading it onto the wharves is absorbed by the carriers. There is no question involved in connection with this character of cotton of allowances to the shipper to cover

a part of the transportation, as is the case in connection with cotton concentrated at the uptown facilities, such as are shown at symbols (F), (G) and (H), Appendix "A". The carrier performs the complete transportation service to the waterfront on interior concentrated cotton moving on export bills of lading and makes delivery of such cotton upon track No. 1 to such facilities as are depicted by Exhibit A-33, Appendix "B". Cotton for the appellants moving inbound for concentration at such waterfront facilities would move in exactly the same manner except, as will be hereinafter shown, that it would require more transportation service and more rehandling by the carrier in order to move the same amount of cotton to such facilities for concentration. The cotton for concentration at the waterfront facility shown by Appendix "B" would be delivered, however, to the same facility and within a few feet of the same track upon which the interior concentrated cotton would be delivered to shipside and the carriers would absorb more cost for unloading than is absorbed on export cotton.

The situation resulting from the construction of the shipside plant at Galveston was brought to the attention of the Commission by the filing of a complaint, known as *Docket 13991*, by Weatherford-Crump & Company, located at Houston, complaining of the application of the domestic rates on cotton delivered at the wharves at shipside and on cotton delivered within the vicinity of the wharves at shipside. Before a decision on that complaint was rendered,

namely, on June 30, 1923, the Commission instituted a general investigation into the conditions above described, stating that its purpose was to investigate the domestic and export rates on cotton from points in the states of Oklahoma, Arkansas, Texas and Louisiana to Galveston, Houston, Texas City, Beaumont and Port Arthur, Texas, and to New Orleans, La., and Mobile, Ala., with the object of determining, first, whether or not the application of the domestic rates to the wharves resulted in illegal practices; and, second, whether any readjustment should be made in existing tariff regulations or rates in order to avoid and remove whatever undue preference, if any, that resulted, or might result, in favor of said water-front shippers or localities, and such undue prejudice that resulted, or might result, against the up-town shippers or localities, or any other undue prejudice against other shippers or localities that might be found to exist, and entering such other order or orders as might be found proper in the premises.

After extensive hearings the Commission rendered its opinion upon this investigation in *Rates on Cotton to Gulf Ports, 100 I. C. C. 159.* In this first opinion the Commission found that the application of the domestic rates to the facilities located on the water-front was not illegal. It also found that the application of a higher rate on export than on domestic commerce to this same water-front resulted in undue preference and discrimination. Effective October 12, 1925, the Commission issued the following order:

> "It is ordered, that the respondents in No. 14940 and above named defendants be, and they are hereby notified and required to cease and desist, on or before October 12, 1925, and thereafter to abstain, from practicing the undue prejudice and preference found in said report to exist." (R. 52-53).

It is to be noted that the only requirement of this order was that the carriers should remove the undue prejudice and preference thus found to exist.

The discrimination found to exist in the report and to which the order necessarily related, is stated by the Commission, 100 I. C. C. 159, at page 166 (R. 49), and is as follows:

> "We are of opinion that the present adjustment of rates on cotton from Oklahoma, Arkansas, Texas and Louisiana to the Texas Gulf ports is unduly prejudicial to the uptown and interior warehouses and compresses and unduly preferential of the water-front warehouses and compresses, and that the rates should be so adjusted that one rate will apply for all deliveries within the usual switching limits of the ports, except that the export rates should be made higher than the domestic rates by an amount equal to the wharfage charge, which at Galveston is 2 cents and at Houston 1.5 cents."

This is the only discrimination or unlawful preference found by the Commission to exist and it related

only to freight rates and did not in any way include allowances, privileges or practices. The order, therefore, requiring the prejudice and preference to be removed related only to freight rates.

Thereafter elaborate petitions were filed for reopening and reconsideration. One of such petitions was filed by the appellants and was dated October 24, 1925. This petition sought reopening and reconsideration by the Commission on the following grounds:

1. That conditions had changed subsequent to the Commission's order referred to above.

2. That the Commission had misunderstood the facts as developed in the previous record.

3. That the privileges and practices in connection with cotton concentrated at interior points and moving to the waterfront resulted in an unjust discrimination against the waterfront facilities.

It is to be noted that in this petition the appellants herein did not ask the Commission to investigate the reasonableness of the rates *per se*, although such appellants were confronted with the Commission's order of October 12, 1925, requiring the discrimination to be removed.

The carriers also filed several petitions with the Commission, one of which was presented by A. C. Fonda for the Texas carriers. The general purpose of those petitions was to secure a reopening of *Docket 14940* and/or postponement and/or modification of the

Commission's order in *Docket 11965*, 77 I. C. C. 388. The point we desire to emphasize particularly in connection with the petitions filed by the carriers is the fact that they sought postponement of the Commission's order on the ground that they were not able to obtain authority from the Texas Commission to bring about the equalization in a manner satisfactory to the carriers. In the petition filed by the Texas carriers it is stated:

> "Furthermore, a revision of the intrastate rates between Texas points so there shall be no disparity between such rates and the interstate domestic rates to the ports, is essential to fully accomplish the desired adjustment. The application which carriers have filed with the Railroad Commission of Texas has been denied without a hearing at which it might be determined whether the proposed rates or some modification thereof should be established."

The disagreement between the Texas Commission and the carriers was a very natural consequence of the situation. It was the position of the carriers that the domestic rate should be increased to practically the level of the export rate, whereas, the Texas Commission held to the view that the export rate ought to be reduced to substantially the level of the domestic rates.

The other southwestern carriers sought reopening on the ground that they were unable to comply with the Commission's order in *Docket 14940* without violating

the order in *Docket 11965*. Thereafter, on the 28th day of December, 1925, the Commission reopened the matter for rehearing and further consideration (R. 54-55). The Commission ordered the case reopened for the purpose of investigating the following matters:

1. To develop facts and conditions not shown of record at the first hearing.

2. To determine if changes had taken place which would warrant any modification of the previous order.

3. To determine what rates should be established to comply with the Commission's order of June 23, 1925. (R. 52-53).

4. To determine whether or not interior practices and services resulted in favor of the interior and to the prejudice of the port concentrators.

5. Whether or not the findings in the original report should be extended to include ports other than the Texas ports.

After extended further hearings upon these questions the Commission rendered its second opinion in this cause and it is reported 123 I. C. C. 685.

The Commission in disposing of Questions No. 1 and 2 above, used the following language at page 690 (R. 61), *123 I. C. C.*:

> "Careful consideration of the situation as developed upon the whole record convinces us of the correctness of our former findings that the exist-

ing adjustment of interstate rates on cotton to the Texas ports, from the states covered by the proceeding, gives to the water-front warehouses and compresses, and shippers using such facilities, an unnatural and unlawful disadvantage to their undue prejudice."

The Commission disposed of Question No. 3 above at page 695 of its opinion in *123 I. C. C.* (R. 64-67), by fixing the exact rate necessary to remove the preference.

The Commission disposed of No. 4 above by finding that the privileges and practices at interior points did not result in undue preference or discrimination.

The Commission disposed of No. 5 by including New Orleans in the terms of its order, and, under date of April 4, 1927, issued its final order, which is contained in full at Record 80-81. The following are the pertinent provisions of that final order:

1. The carriers were required to cease and desist, and thereafter to abstain from practicing the undue prejudice and preference found to exist.

2. The order in *Docket 11965* was modified to the extent necessary to permit the readjustment of the rates in the manner indicated in said report for the purpose of securing compliance with the order.

3. The domestic and export rates were to be readjusted in such a manner as to bring about a removal

of the discrimination, prejudice, and preference found to exist. The specific character of that readjustment of the rates was set out in the Commission's opinion.

That portion of the opinion in which the Commission prescribed the manner in which the rates should be readjusted is found at page 695 of 123 I. C. C. and is set forth at page 66 and 67 of the record. Briefly, it required an advance of 1 cent per 100 pounds in the city-delivery domestic rates and a 2-cent reduction per 100 pounds in the shipside export rates. It should be observed that both the original order of the Commission, dated June 23, 1925 (R. 52-53), and the final order, dated April 4, 1927 (R. 80-81), required the removal of the preference found in the report to exist, and also prescribed the exact rate necessary to remove that preference. Certainly, the order cannot be broader than the discrimination and preference which the Commission found in its report to exist. The discrimination and preference which the Commission found to exist resulted from the rates, and the only discrimination and preference affected by the order is that resulting from the application of the domestic and export rates. No practices, no privileges, no allowances, —nothing other than the rates themselves, were included within the scope of the Commission's order.

That order was attacked in the courts below by the appellants herein and by the defendant carriers. The appellants' attack upon the validity of the Commission's order was based upon the following contentions:

1. That the order of the Commission was made without evidence, and was therefore arbitrary and void.

2. That, if supported by evidence, the Commission nevertheless made an error of law, because the Commission's order deprived the waterfront facilities of the advantage of their locality.

3. That the Commission's order was invalid because it undertook to increase rates applicable to water-front facilities without an investigation of the reasonableness *per se* of the rates under attack; that, regardless of the reasonableness of the rates under Section 1 of the Act, there was no evidence of record before the Commission upon which to base a finding as to what would be a reasonable rate.

4. That the Commission arbitrarily approved an allowance for the cost to the back-from-the-water-front facilities of getting their cotton to shipside, and denied a similar allowance to others similarly situated. (R. 3-35).

The carriers in the court below sought to attack the Commission's order upon the following grounds:

1. That the Commission had previously found reasonable the rates which they now undertook to reduce in this case in order to remove prejudice and preference.

2. That the Commission only had the power to order the preference removed and did not have the power

and jurisdiction to fix the exact rate necessary to remove the preference.

3. That the Commission has the power to fix rates only in a proceeding involving reasonableness *per se* under Section 1.

4. That, regardless of the issue of reasonableness, there was no evidence upon which to base a finding as to the specific amount of the rate.

5. That the Commission's finding and order of undue preference and discrimination was arbitrary and not supported by evidence.

6. That the manner and method prescribed by the Commission for removing the discrimination and preference was confiscatory and violative of the carriers' constitutional rights.

These contentions with regard to the validity of the Commission's order were presented to the three-judge statutory court comprised of Honorable Rufus E. Foster, Circuit Judge, Honorable Joseph C. Hutcheson, Jr., and Honorable Louis H. Burns (now deceased), District Judges. At the time of the oral presentation of the matter, much confusion was created by the plaintiffs' (appellants here) effort to entangle the facts with regard to the allowances made with the respective services performed for the various cotton concentrators. Consequently, the Honorable Judges granted an interlocutory injunction, in order that they might give the question proper consideration and investigate the rec-

ord before the Commission. The interlocutory injunction was granted July 13, 1927. After an extended investigation and mature consideration, the three-judge court unanimously recalled the interlocutory order, and vacated and dissolved the stay granted thereby, effective December 2, 1927, and dismissed the bill for want of equity. The opinion of the three-judge court appears at Record 131-141.

The carriers, subsequent to the decision of the court below, abandoned their attack on the Commission's order. (R. 157-159).

This case, therefore, is before this Court upon the issues raised by the appellant shippers and warehouse companies. From the brief filed by these appellants we briefly summarize the basis of their attack as follows:

1. That the Commission's order is unsupported by evidence and is, therefore, arbitrary.

2. That the Commission has no authority to fix a rate for the purpose of removing discrimination, but can only fix rates under Section 1 of the Act after an investigation of their reasonableness *per se*.

3. That the Commission approved allowances for the appellees and denied allowances to appellants.

4. That the Commission's order was invalid, because it sought to equalize commercial conditions.

We have found it convenient to reply to appellants' contentions under the following headings:

1. The Commission's order removing the discrimination and fixing the rate necessary to remove it is amply sustained by the evidence of record.

2. The Commission has power, authority and jurisdiction to require the removal of a discrimination and prejudice by fixing the specific rate necessary to remove it.

3. The Commission's order relates in no way to allowances made by the carrier to anyone. The question involved as to allowances is a matter of tariff interpretation.

4. The Commission's order is not based upon commercial conditions and does not deprive the appellants of any transportation advantage resulting from the location of appellants' facilities. The sole effect of the Commission's order is to require the removal of an unjust preference and advantage.

## ARGUMENT

### I

**The Commission's order removing the discrimination and fixing the rate necessary to remove it is amply sustained by the evidence of record.**

In considering the evidence upon which the Commission based its finding and order of discrimination and preference, the various questions involved will be dealt with in the following order:

1. The discrimination as between interior concentrators and port concentrators at shipside.

2. The discrimination between port concentrators at the water-front and port concentrators back of the water-front.

Taking up the first discrimination and preference found to exist between interior concentrators and water-front port concentrators, the Commission's finding was that the dual-rate system resulted in preference and advantage to the water-front port concentrators and a corresponding disadvantage to interior concentrators. In dealing with this question, we would respectfully request the attention of the Court to the very excellent description of the nature of the cotton traffic found at pages 6 and 7 of the appellants' brief. Appellants have there outlined accurately and adequately the circumstances attending the marketing

of the cotton crop. Appellants' discussion reveals the necessity of concentrating the small lots of different grades and composition into large lots of uniform grades and composition, in order that the requirements of the spinning mills may be met. Both the interior concentrator and the water-front concentrator must accomplish that object, and the only difference between their respective problems lies in the fact that one concentrates his cotton in the interior, at or near the source of production, whereas, the other gathers his purchases together and prepares his cotton for merchandizing at the end of the rail transportation prior to delivery to the water lines.

Appellants state, at pages 6 and 7 of their brief, that the cotton originates with the producer in small lots, and that it is seldom practicable at the purchasing point to obtain a sufficient volume of cotton to market direct shipments; that it is usual to assemble the cotton at concentration points, both at interior and at the ports. In connection with the business of appellants, that concentration is accomplished at the water-front facility at the ports. We call attention, furthermore, to the fact that where the cotton moves out of the concentration point, whether in the interior or at the port, it moves out in large lots of even-running grade and staple. The important fact is that the cotton moves into the concentration point in small lots and out in large lots. It is obvious, therefore, that the movement inbound into the water-front facility, for the total distance of the rail transportation to the

water-front, is in small lots, whereas, in connection with interior concentration, the movement of the small lots is for short distances to the interior concentrating points, and thence for the long distance by rail to the water-front in larger shipping lots.

The importance of this fact is apparent from the statement, at page 3 of appellants' brief, to the effect that "the rates apply to shipments of cotton in any quantity and therefore include the obligation of unloading; in general, however, this is discharged by an allowance to the shipper". In other words, the rates are applicable to cotton, regardless of the quantity shipped in any one given car, and the large lot of the interior concentrator moving in one car to the water-front would be charged the same rate as the small lot of the port concentrator moving to the water-front facility for concentration. This fact is most important in connection with the evidence before the Commission as to transportation characteristics attending the movement of export cotton from an interior concentrating point to the water-front, as compared with a domestic movement to the water front.

There is no allowance made to an interior concentrator of any kind. He does not receive any drayage allowance or unloading allowance. The cotton moving on a through export bill of lading or on a bill of lading marked for export can only be interior concentrated cotton. This cotton is tendered to the carrier in carload lots and moves direct to the shipside wharves by railroad and the carriers make no allowances such as are

involved in connection with the cotton concentrated at the up-town facilities at the ports and in connection with 70 per cent of the cotton concentrated at the waterfront facilities.

As to the transportation service involved on cotton concentrated at the interior point moving to the water-front and cotton moving to the water-front for concentration, respectively, we point to the testimony of Witness Pecot (R. 620-22) and the Exhibits A-104 and A-105 filed by that witness (see pages 160 and 161 of original exhibits). It will be observed that the shipment of the small lots moving from points of production to the interior concentrating points show an average loading of 27 bales per car, whereas, the movement of compressed-in-transit cotton outbound from the interior compress point shows an average loading per car of 63 bales. Those exhibits show, further, that the movements outbound of concentrated cotton from interior concentration points maintains an average loading of 72 bales per car. Bearing in mind the fact that cotton moves at the same rate per 100 pounds, whether the individual shipment consists of 1 bale or 100 bales, it is to be observed that a shipper forwarding 72 bales per car from the interior concentrating point is demanding less service of the carrier than a shipper forwarding 63 bales per car outbound from the interior compress point or a shipper forwarding 27 bales per car outbound from an interior point. Although it was shown in the record that there is a substantial movement of flat, or uncompressed cotton to the water-front facility for concentration (R. 804-805) with an average

loading of 27 bales per car, the record nevertheless shows that the large volume of movement to the water-front for concentration is compressed-in-transit cotton, which moves in the following manner: The small lots of cotton, as they come to the carrier from the producer, are assembled by the carrier at the nearest compress point, there compressed in transit and forwarded to destination as compressed cotton. This is the character of cotton which moves in the largest volume to the water-front facility. Interior concentrated cotton, on the other hand, moves in small lots to the interior concentrating point, which is usually also the point at which the carrier has the service of compression performed, is there concentrated into large lots and forwarded direct to the water-front.

It should be observed, first, that the average loading per car of interior concentrated cotton is 9 bales, or 4500 pounds, greater than that of compressed-in-transit cotton and nearly three times the average of the flat cotton; second, that, in 89.5 per cent of the instances, the interior concentrated cotton moves direct to the wharves, or to the delivering points at the ports, without rehandling by the carrier at the ports, and that only 10.5 percent of the interior concentrated cotton is rehandled at the ports; third, that of the transit cotton, which is the character of cotton moving to the facilities of appellants, 43.5 percent is rehandled at the mixed platform at the ports and only 56.5 percent goes direct to the water-front or direct to the consignee located at other points at the port.

The rehandling at the mixed platform is described by the Witness Pecot (R. 620-22) and by Witness E. A. O'Donnell (R. 851-53). The testimony of those witnesses shows that the mixed platform handling involves materially greater services and greater costs than is the case in connection with the handling of cotton direct to the consignee. The interior concentrator, therefore, by reason of the fact that he has collected his cotton into larger lots, is enabled to move it direct to the water-front, without rehandling at the port, whereas, the water-front concentrator, as well as other port concentrators moving their cotton in small lots to the water-front, necessarily requires the carrier to rehandle the cotton at the port, in order to sort the contents of each individual car and separate the small shipments billed to various consignees. In other words, the movement from interior-concentration points to the ports is almost uniformly in carload lots, whereas, the shipments to port concentrators, such as appellants, to the extent of 43.5 percent of the cotton so handled, must be switched to the mixed platform, unloaded, sorted among the various consignees, and thereafter reloaded into other cars for switching to the facilities of such consignees.

This final switching to the water-front, in addition to all of the other services of transporting the cotton to the mixed platform, unloading, assorting, and reloading, should be compared with the services rendered in connection with interior concentrated cotton loading on the average 72 bales to the car, 9 bales in excess of the

average on transit cotton, and moving direct to the water-front without rehandling in 89.5 percent of the instances.

Proceeding from this stage in the transportation of these two classes of shipments, we respectfully request the attention of the Court to Exhibit A-33 filed before the Commission, now before this Court in its original form, and reproduced herein as Appendix "B". This Exhibit is a floor plan of the warehouse of the Houston Compress Company. The warehouse itself is located on the ship channel. Track No. 1, as shown on the exhibit, is the track serving the water-front berths 1, 2, 3, and 4. Track No. 2 and Track No. 3 serve the back of the warehouse. It is 90 feet from Track 1 to the warehouse, 150 feet from Track 1 to the south wall of the warehouse, 67 feet from the south wall of the warehouse to Track No. 2, and 68 feet from Track No. 2 to Track No. 3. A car of cotton concentrated at an interior point moving to the water front on a through export bill of lading would ordinarily be delivered to the water front on Track No. 1, although it is sometimes delivered to the water-front on Tracks 2 and 3 (R. 527). Cotton moving to the water-front for concentration is ordinarily delivered on Track No. 2, although it is sometimes delivered to the warehouse on all three tracks. (R. 526-27).

Bearing in mind the service performed by the carrier as described above in connection with interior concentrated cotton, as compared with cotton concentrated at the warehouse shown in Appendix "B", we desire to re-

quest the attention of the Court to the finding of the Commission with regard to the character of the rates collected on these two classes of shipments. The Commission found that, in every instance in which interior concentrated cotton moved on a through export bill of lading or on a bill of lading marked for export, the carriers collected a rate which was from 3 to 3.5 cents per 100 pounds higher than the rate collected on cotton concentrated at the water-front. Interior concentrated cotton moving on a through export bill of lading or on a bill of lading marked for export would terminate its rail transportation on Tracks 1, 2, and 3 of Appendix "B". In a like manner the cotton moving to the water-front warehouse depicted on Appendix "B" would be delivered on Tracks 1, 2, and 3. It is apparent, therefore, that in connection with the domestic rates and the domestic services a greater service was performed and a lower rate collected than was the case in connection with the through or export movement.

In connection with the through bill of lading cotton, which is frequently delivered to shipside on the same track as the domestic cotton is delivered to water-front facilities, the record shows that the carriers' cost of unloading the through bill of lading cotton and placing it in the ship's berth is less than the cost assumed by the carriers in connection with the unloading of domestic commerce into the water-front facility for the water-front concentrators (R. 678). The testimony of the respondent carriers in connection with this matter is to the same effect, and Witness S. G. Reed testified before the Commission as follows:

> "On a domestic bill of lading where the 80 cents rate should apply going to a shipside facility, we would absorb 1 cent per 100 pounds at Houston for unloading. We can have the unloading performed for 4 cents (per bale) on export traffic. We pay 5½ cents on one and 4 cents on the other at Houston, but it is not identical service." (R. 834-5).

The services are not identical because the unloading for 4 cents per bale includes the placing of the cotton in the ship's berth, whereas the 5½ cents per bale covers only the unloading of the cotton moving on a domestic bill of lading. Upon these facts the Commission found in *123 I. C. C.*, at page 702, that (R. 75) "concentration in transit, like compression in transit, unquestionably reduces rather than increases the carriers' expenses of transportation".

At page 29 of their brief filed with this Court, appellants concede the correctness of that finding. They contend, however, that these facts, should have received no consideration at the hands of the Commission and assert that the relative transportation costs of export versus domestic commerce should be determined by considering only the following matters:

1. Car detention on export, as compared with domestic, commerce.

2. The value of the service to the shipper on export, as compared with domestic, commerce.

3. The expedited service on export, as compared with domestic, commerce.

4. The incidental service involved in connection with the issuance of through export bills of lading.

In dealing with the position thus assumed by appellants, we would first request attention to the direct contradiction between two of the contentions here urged by appellants. Appellants assert that the carriers' transportation costs are increased by car detention, and yet urge as one of the advantages under the export billing the expedited service alleged to be necessary in connection with the export movement. Certainly, if it is necessary to rush forward the traffic of the interior concentrator, in order that it may be loaded on a particular ship, it can scarcely be said that such a movement involves the detention of the carriers' equipment.

Taking up specifically the first contention of appellants as set out above, namely, that the difference between the export and domestic rates is to be justified by reference to the cost of car detention. We desire to request the attention of the Court to the fact that cost to the carrier for the length of time a particular car may be detained necessarily varies with the volume of cotton loaded in that car. As pointed out above herein, the average loading of the interior concentrated cotton was shown to be 72 bales per car. Cotton concentrated at the water-front and compressed in transit was shown to have loaded 63 bales to the car. Cotton moving to the water-front flat, or uncompressed is shown to have loaded 27 bales per car. It is obvious that the carriers' cost per 100 pounds of cotton for car detention would vary in each of these instances. It would be less in

connection with the interior concentrated cotton than in the case of transit cotton concentrated at the water front or cotton moved to the port flat, or uncompressed. That would be true, even if it were true that the cars transporting interior concentrated cotton in export commerce were in fact detained for periods in excess of the detention on domestic commerce. The facts are, however, as shown by Exhibits 186 and 187, that the average detention of cars handling export commerce is not materially in excess of the detention permitted in connection with the cars handling domestic commerce. Exhibits 186 and 187 (R. 224-230) show that, for the year ending July 31, 1925, the average detention on through-bill-of-lading cotton at Galveston was 3.47 days and the average detention of cotton moving on local bills at the export rate 2.94 days. For 1924, the average detention for through-bill-of-lading cotton was 3.34 days and for 1925, 2.09. At Houston, for the year ending July 31, 1925, the average detention on through-bill-of-lading cotton was 2.38 days. The average detention on cotton moving under local bills of lading marked for export is shown as 1.88 days.

The free time allowed in connection with domestic commerce has been correctly stated by appellants as being 2 days. It is obvious, therefore, that the Commission had evidence before it upon which to determine whether or not the factor of car detention increases the carriers' expense in connection with export commerce sufficiently to justify a higher rate on export commerce than that applied in connection with domestic

commerce. Furthermore, the question of car detention and demurage is a matter within the control of the carrier, because the commerce in question is any-quantity traffic, the obligation to unload the car resting upon the carriers. (Page 3, Appellants' brief). But, even if it were not shown that the obligation to unload rests upon the carriers, and even if it were not true the question of car detention on through traffic is a question solely between the rail carriers and water carriers, the evidence before the Commission established conclusively that there was no undue detention of the equipment in transporting export and foreign commerce. In addition to this fact, the cost of that detention, because of the substantially heavier average loading of interior-concentrated cotton, is materially less on each bale, or on each 100 pounds, of that character of cotton. When we consider also the relatively greater expense involved in connection with the port concentrated cotton as a result of the rehandling at the mixed platforms, which has been shown to be necessary in connection with that character of shipment, it is apparent that the actual transportation costs on interior-concentrated cotton, instead of being greater, must be materially less than such cost on cotton concentrated at the ports.

Taking up now the question of the relative value of the service to the shippers, the second question raised by appellants, as we have analyzed their contentions above, we find that appellants take the position that, although the transportation service may be less, and consequently the carrier's transportation costs may be less, in con-

nection with export commerce, the commercial value realized by the shipper from the transportation of interior-concentrated cotton is greater than that realized from the transportation of cotton concentrated at the ports, and that that alleged greater commercial value should be availed of as a justification for exacting a greater charge from the interior shipper.

We know of no instance in which freight rates have been constructed, and no instance in which discrimination has been justified, upon such a basis, in a case in which only one commodity, all units of which obviously have the same value, is involved. The question of discrimination and preference, in all the cases which have been decided, either by the courts or by the rate-making bodies, under Anglo-American law, so far as we have been able to determine, has always been determined by reference to the respective transportation services received. The value of the service to the shipper is determined by the value of the commodity for the purpose of fixing reasonable rates. *Interstate Commerce Commission vs. Delaware, Lackawanna & Western, 64 Fed. 723; Minneapolis & St. Louis R. R. vs. State of Minnesota, 186 U. S. 257, 22 Sup. Ct. 900.* The value of the commodity involved in this case is obviously the same, because it is the same commodity going to each of the respective parties. Aside from that fact, however, the record shows that it is not true that any greater value results to the shipper of export commerce than to the shipper of domestic commerce from the transportation services accorded by the carriers. On the contrary, the undisputed testimony (R. 697-698)

shows that if any difference exists between the relative value of the carriers' services in the transportation of the two classes of cotton here involved, the shipper utilizing the through bill of lading and the export bill of lading receives less actual commercial value from the services of the carrier than the shipper on the domestic bill of lading.

In regard to the third proposition urged by appellants in attempted extenuation of the discrimination denounced by the Commission, namely, the question of expedited service, we desire to say that there is not one word of evidence in the record before the Commission showing that any interior concentrator or shipper of export commerce has in fact demanded, or received, any expedited service in connection with the handling of his cotton which has not been accorded by the carriers in the same manner, and to the same degree, to the shippers on domestic bill of lading who concentrate at the ports. Appellants themselves assert, at page 3 of their brief, that the line haul under export rates is indistinguishable from that performed by the carriers under local rates. Such being the fact, it is obvious that the expediting of the shipment through the terminals at the port is accomplished, if at all, at the instance of the carrier, and results in benefit, rather than detriment, to the carrier. Such being the case, it can scarcely be urged here as justification for a discriminatory and excessive charge assessed against one particular character of commerce.

Passing to the fourth and last contention of appel-

lants listed above, namely, that greater services are rendered in connection with the issuance of through export bills of lading than in connection with the issuance of domestic bills of lading, we assert that the testimony in the record before the Commission is conclusive to the effect that the issuance of such through export bills of lading, far from entailing extra service or, expense on behalf of the carriers, actually result in economy and benefit to them. In this connection we respectfully request the attention of the Court to the narrative of the testimony of Witness Griffin, copied from page 691-2 of the transcript of the record:

> "In reality the issuance of a through bill of lading is of benefit to the carriers for the reason that at the ports the carriers do not effect delivery of the shipment in or on their own terminals, but cars are delivered at the ports to wharf or terminal companies which effect the delivery to the ships and thereby prevent an accumulation of cars in the carriers' yards at the ports."

Finally, in connection with this question, we would request attention to the testimony of witness O. J. Brown, Terminal Superintendent for the railroads at Houston. Referring to Exhibit A-33, reproduced herein as Appendix "B", that witness stated that, "in the physical handling of cotton within the terminals at Houston, within the switching limits of Houston, there is no difference between the cost to the carrier of handling through-bill-of-lading, or ships' cotton to that facility shown on Exhibit A-33 (Appendix "B") and

the cost to the carrier of handling local delivery cotton to that facility". (R. 526).

The record shows, therefore, by the overwhelming preponderance of the evidence that the transportation services performed, and the transportation costs incurred, in connection with export and foreign commerce moving on a through bill of lading from an interior concentration point are materially less than the services rendered in connection with cotton moving on a domestic bill of lading to the water-front facilities.

The record as to the other phases of the discrimination against export commerce is equally conclusive. It shows that the interior concentrators are in active competition with the water-front concentrators for the sale of the producers' cotton in export commerce. It shows that the difference of 3 cents per 100 pounds in favor of the water-front concentrator constituted an advantage sufficient to enable the water-front concentrator to under-bid the interior concentrator for the export business, and, therefore, to deprive the latter of that business. As representative of that evidence, we would refer to the testimony of the following witnesses: Witness Neale (R. 652; Witness Bennett (R. 727); Witness Steel (R. 207); Witness Westbrook (R. 211); Witness Harris (R. 213); Witness Reed (R. 217); Witness Tiedeman (R. 220); Witness Toombs (R. 222); Witness Kempner (R. 230); Witness Eggers (R. 234); Witness Knowles (R. 235); and Witness Nowlin (R. 236). In addition to this general testimony dealing with competition and the effect of the adjustment of

the rates upon that competition, we have the specific testimony of Witness Drewey (R. 646), showing an actual loss in business by the interior concentrators. In addition thereto, the record contains exhibits showing the exact loss sustained by the interior concentrators subsequent to the effective date of the two-rate plan in 1917, and the construction of water-front facilities which was in 1923. From Exhibits A-136 (R. 183-197) we have compiled the following table:

RECORDS OF 10 COMPRESSES AT 10 TEXAS CITIES

| Year | BALES HANDLED | | | | RATIO TO TOTAL | | |
|---|---|---|---|---|---|---|---|
| | Railroad Transit | Railroad Concentrated | City or Wagon | Total | Railroad Transit | Railroad Concentrated | City or Wagon |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| 1913-14 | 41,254 | 326,795 | 89,409 | 457,447 | 9.0 | 71.4 | 19.6 |
| 1914-15 | 45,935 | 424,521 | 124,519 | 594,975 | 7.7 | 71.4 | 20.9 |
| 1915-16 | 39,549 | 318,588 | 100,452 | 458,589 | 8.8 | 68.5 | 22.7 |
| 1916-17 | 59,376 | 398,887 | 130,785 | 589,048 | 9.9 | 67.7 | 22.4 |
| 1917-18 | 72,576 | 393,544 | 107,737 | 573,857 | 12.6 | 68.6 | 18.8 |
| 1918-19 | 45,111 | 330,227 | 97,160 | 472,498 | 9.5 | 67.7 | 22.8 |
| 1919-20 | 68,140 | 344,414 | 90,107 | 502,661 | 13.6 | 68.5 | 17.9 |
| 1920-21 | 100,898 | 353,354 | 138,679 | 592,931 | 17.1 | 60.1 | 22.8 |
| 1921-22 | 70,002 | 213,019 | 89,775 | 372,796 | 18.8 | 57.1 | 24.1 |
| 1922-23 | 106,430 | 211,937 | 84,835 | 403,202 | 26.4 | 52.5 | 21.1 |
| 1923-24 | 151,001 | 246,609 | 102,738 | 500,348 | 30.2 | 49.7 | 20.1 |
| 1924-25 | 295,410 | 232,144 | 95,645 | 623,199 | 47.4 | 37.3 | 15.3 |

It should be noted that, with the construction of water-front facilities which began operation in 1923, the volume of interior concentrated cotton, which is listed above as railroad concentrated cotton, immediately

began to decline and that the volume of railroad transit cotton, which is the cotton handled by the appellants, immediately increased. For instance, in 1914, the year when the total volume of cotton handled was 457,447 bales, 326,795 bales were concentrated at interior points. In 1924-25 the total volume was 623,199 bales, an increase of over 200,000 bales in the total handled over 1914, but the interior concentrated business had dropped from 326,000 bales to 232,000 bales. The court below, in reviewing the foregoing facts, stated that it had no difficulty in sustaining the Commission's power to find that a condition of undue prejudice resulted from the two-rate plan. They concluded, therefore, that the order of the Commission, based on that finding, insofar as it directed the removal of that discrimination was a reasonable and proper exercise of the Commission's jurisdiction and afforded the plaintiffs below no ground for equitable relief.

We most respectfully submit, therefore, that as to the first proposition set out above, namely, the matter of discrimination as between the interior concentrators and port concentrators at shipside, there can be no question that the Commission had before it facts of record amply sufficient to establish clearly and positively the relative character of the transportation services rendered in connection with both characters of traffic, namely, that of interior concentrated cotton moving on a through bill of lading or an export bill of lading, as compared with the movement of domestic commerce on a domestic bill of lading.

Passing now to the second character of discrimination referred to above, the discrimination and preference found to exist in connection with the movement of commerce to shipside concentrators, as compared with back-of-the-water-front or up-town, concentrators at the port, we would respectfully request the attention of the Court to the facts established by the evidence with regard to that question.

In dealing with this phase of the discrimination found to result from the two-rate system, no serious question can be raised with reference to the matter of car detention. It is true that the carriers' tariffs obligate them to perform the service of delivery to the shipside after concentration at an up-town, or back-of-the-water-front, concentration point; but, as will be hereinafter shown, the carrier makes an allowance to the shipper to cover the performance of this service, in lieu of performing the service itself. That allowance is a substitute for rail service, and is made to cover the cost of drayage performed by the shipper. The question involved as to the services rendered the two concentrators, up-town and water-front, is therefore to be determined by a comparison between the service performed for the water-front facility in transporting the cotton direct to the water-front, on the one hand, and the inbound service to the up-town facility, plus the allowance in lieu of the transportation service the carrier is obligated to perform from the up-town facility to the water-front, on the other hand. The up-town concentrator brings cotton into its facility, concentrates it and thereafter drays it to the water-front or to shipside.

The carrier makes an allowance to cover the cost of the drayage. The water-front concentrator brings the cotton in from interior points and the carrier transports it direct to the water-front. The carriers switch the direct movements to the water-front facility through their congested terminals, and have contended in this record that the actual cost of switching approximates the cost of drayage. (R. 819). Witness Drake for the carriers testified as to some of the additional costs of switching to the water-front, as compared with delivery to an up-town warehouse. (R. 844-851). If the carriers incur additional costs in moving the traffic from an up-town location to the water-front, it necessarily follows that such costs are encountered regardless of whether the movement is direct to the water-front or whether it takes place after concentration at an up-town facility.

In connection with the matter, appellants have correctly stated that there is no material difference in the line-haul movement to the ports. The services up to the break-up yards, symbol (5), Appendix "A", obviously must be the same on both classes of traffic, because both the back-of-the-water-front concentrators located at symbols (F), (G), (H), etc., and the water-front concentrators located at symbol (P), Appendix "A", move flat, or uncompressed, cotton, loading 27 bales to the car, and compressed-in-transit cotton, loading 63 bales to the car, into their respective plants. It is also true that both water-front and up-town concentrators purchase cotton at interior points which has been pre-

viously concentrated at such interior points and, therefore, moves in domestic commerce as interior-concentrated cotton, which is the same character of cotton as that moving on a through bill of lading or on an export bill of lading to the water-front. When cotton previously concentrated at interior points is purchased by port concentrators, it moves to the port concentrator, usually in mixed cars with compressed-in-transit cotton, and, therefore, would receive the service of rehandling at the mixed platform at the ports to the same extent as compressed-in-transit and uncompressed cotton.

As previously stated, however, the line-haul service for both water-front concentrator and up-town concentrator up to symbol (5), Appendix "B", must necessarily be the same. The question remains, therefore, as to whether or not the Commission had before it evidence as to the transportation service rendered by the carriers in connection with movements through up-town concentration points (symbols (F), (G), (H), etc., on Appendix "A") to the water-front, as compared with the direct movement of the same character of commerce to the water-front. We assert that the Commission had before it ample evidence as to the relative services performed in connection with such movements. The respective operations of the up-town concentrators and water-front concentrators may be briefly described as follows: Both concentrators purchase cotton in small lots as it comes from the producer and move it flat, at an average loading of 27 bales per car, or compressed-in-transit, at an average loading of 63 bales per car, to

their respective facilities. The cotton is there merchandized and assorted into even running grades, character, and staple, so as to be suitable for the consuming mills in Europe. After concentration, it is forwarded in large shipping lots to the spinning mills. In the case of the up-town concentrator located generally in the vicinity of (F), (G), (H), (K), etc., there is an outbound movement to the water-front located between symbols (7) and (8), Appendix "A". Under the carriers' tariffs, effective at the time these hearings were held, and which are still effective, the carriers were required, under the export rates, to perform the complete transportation to water-front. The domestic rates, in the same way, required delivery upon the wharves at the waterfront where the movement was upon local or domestic bill of lading. (R. 244). Therefore, in the case of the up-town facilities, additional rail transportation was necessary after concentration. In the case of the water-front facilities, on the other hand, the carrier had already performed that service by moving the small lots of cotton through the terminal to the water-front facility.

It is also true that the water-front facilities, for instance, the ones located at symbol (V) or symbol (P), have the privilege under these existing tariffs of concentrating and moving cotton by rail from their facilities where rail transportation is necessary to reach shipside. The record shows that 70 percent of the cotton handled by such water-front facilities is reforwarded by rail (R. 296). In other words, only 30 percent is actually delivered direct to the ship at the water-

front facility. It is obvious that, as to 70 per cent of the traffic moving through the water-front facilities, such facilities and concentrators would receive more service inbound than would the up-town concentrators and facilities, and in addition thereto would receive the same outbound service to the shipside as the up-town facilities. The testimony also shows conclusively that the services performed in connection with the 30 per cent of the traffic moving through the water-front facilities which is in fact delivered direct to the ship are substantially the same as the services performed in connection with the movement to shipside through the up-town facilities. We respectfully request the attention of the Court to the testimony of Witness Griffin, beginning at the bottom of page 676 of the record and extending through to page 679. For convenience we quote.

> "In Houston and Galveston there are less switch moves and less transportation services made in making delivery to warehouses back from the water front than in making delivery to plants at Houston located on the water front that can effect shipside delivery. As example, we are taking three cars arriving in the same train, first car containing (fol. 648) cotton from the interior direct to shipside, at Long Reach, (appendix "B") second car containing cotton from the interior for local delivery to the Houston Compress Company's Long Reach plant, and third car containing cotton for local delivery to the Southern Compress & Warehouse Co., back from the water front. These plants are each located on the International-Great

Northern Railway, and the switching and delivery is performed by that same railway. I had Exhibit No. A-121 (Appendix "A") prepared, and from my knowledge of the Houston Terminal situation, it is approximately correct (R. 3289). On arrival at Houston, the train would be stopped in the I-GN North Yard, symbol 5 Exhibit A-121, where it would be broken up and the cars classified. The same three cars would be brought together from the I-GN North Yard to their Congress Street Yard, symbol 0, in which is located the plant of the Southern Compress & Warehouse Co. There the car for delivery to the Southern Compress & Warehouse Co. would be placed for unloading at the plant, which is located in the Congress Street Yard. The car for local delivery to the Houston Compress Co.'s Long Reach plant and the car for shipside delivery at the same Long Reach plant, would after re-classification, be taken by another engine from the Congress Street Yard, symbol 0, out to the I-GN Yard on the ship channel, known as Booth Yard, symbol 8, and would there be held until ordered placed for unloading. In other words, the movement would first be from Symbol No. 5 to Symbol 0, on Exhibit A-121, and at symbol 0, there would be another reclassification, and then there would be a movement similar to a line haul by the International-Great Northern from symbol 0, on Congress Street, about seven miles down to the ship channel, or whatever distance it happens to be, and the cars would again be placed in Booth Yard, symbol 8. That would be a switching movement for a distance of approximately not more than 5 miles, from symbol 0 to (R. 3290) symbol 8. Then it would be put into Booth Yard for reclassification again. That would

be a third classification of those cars. Then they would be classified and moved from Booth Yard into the Long Reach plant, symbol P, and placed for unloading. If there should happen to be any cars going to the Houston Terminal Railroad, which has connection with the I.-G.N., those cars would be placed on interchange track down at the ship channel, and the port terminal railroad would take those cars off to symbol 7 on Exhibit A (fol. 649) 121. There they would break them up again and place them in the switch, such as the Turning Basin Compress, a plant served by the Port Terminal (R. 3291) Railroad. The cars for shipside delivery and for local delivery at the Houston Compress & Warehouse Company. Long Reach plant, and at the Ship Channel Compress Co., symbol Q, Alexander Sprunt & Son, would be placed on immediately adjacent tracks for unloading. Alexander Sprunt is marked Symbol T on the legend, and the Q that is shown on the Channel here is the plant of Alexander Sprunt, therefore where it shows T, Alexander Sprunt & Son, that T should be erased and Q instead. A charge of 4c per bale, which is absorbed by the railroads out of the rate, is made by the Houston Compress Co. (Anderson Clayton & Co., operators), and the Ship Channel Compress Co. (Alexander Sprunt & Son, operators), for unloading the direct movement from the interior to shipside and for delivery to steamship agent at shipside of within the usual distance, 200 feet from ship's tackle. The cars containing local delivery cotton and shipside delivery switch movement cotton would be unloaded by the Houston Compress Co., or other shipside facility for account of the owner of the cotton, the latter at a charge of 4c per bale. Where the cotton

was unloaded by the Houston Compress Co. for the owner on local delivery cotton, the railroads would absorb 1c per 100 pounds unloading (R. 3293). In other words, on the domestic rate of 80c, the railroads absorb the same unloading allowance or a greater unloading allowance than they do on the through bill of lading traffic. This would go to the owner of the cotton. The compress facility would unload it for the owner and charge him for unloading it, and the owner would obtain 5-1/4c per bale from the carriers as an allowance for unloading. On the through bill of lading cotton, the carriers would absorb the cost of unloading, not to exceed 4c per bale.

"There would be two less switching moves and less service performed in placing the cotton at our plant back from the water front in the Congress Street Yard, and one less move in placing cotton at our plant back from the water front in the 5th Ward, than there would be in placing the cotton for local delivery at the Long Reach plant of the Houston Compress Co."

The testimony of the carriers showing the approximate additional cost of moving the cotton from the up-town yards to the water-front, in the first instance, as compared with making delivery to the up-town facility, confirms the testimony of Witness Griffin. Witness Drake for the carriers, testifying as to the relative costs, concluded his testimony on this subject as follows:

"Taking ten cars originating in the interior consigned to us upon a through bill of lading and

orginating on the international and great Northern, at Palestine, and taking ten cars consigned to the Houston Compress & Warehouse facility marked P on Exhibit A-121, on a local Texas domestic bill of lading, those 20 cars coming in on the International & Great Northern yard train, into the yard marked 5 on Exhibit A-121, there would be no difference in the service of handling those cars from Yard 5 down to the ship's channel (R. 3971), assuming that they arrive at Percival Yard in the same train. If 10 of them are going to (Fol. 849) the public dock for export, they would be placed on interchange tracks in that yard for the Port Terminal Railroad. The International & Great Northern would give it to us at about No. 8 on this map, (Appendix "A") and if it belonged to the Turning Basin we would take it over to North Yard No. 7 and classify it, but if for the public dock on the South side, we would place the whole 10 cars onto those tracks. *The 10 cars going to the Houston Compress Company would be ordered in a car at a time and by car number, or they might be ordered in all at one time* (Italics ours) (R. 3972), and that would involve additional cost and additional switching on the part of the International & Great Northern. It would be more costly than setting in the 10 cars to the public dock. If one car was consigned to the McFadden Plant via the Congress Street Yard, and the other ten are consigned to the Houston Compress Company on the ship channel, they would come in from Palestine in the Percival Yard, shown at Symbol 5 in Exhibit A-21, in the same train. The one car would be placed in a separate cut for the Congress Street yard. All of the cars would not be brought to Congress Street Yard for classification; they would make

the classification in Percival Yard. Only trains would pass through the Congress Street Yard (R. 3973), going to Booth Yard or the Long Reach Wharf. The others would be destined to Congress Street Yard, having in the train cars of the McFadden Warehouse and other industries in that section. There would be additional cost to the carriers in going to the Ship Channel over what it would cost to come down to the Congress Street Yard and place it. There would be a material cost. It would have to average $5.00 shown on Exhibit A-192 plus the cost of bringing it from the Congress Street Yard down to the Interchange point. That would be way and above what it would cost to bring the car down to Congress Street Yard, Symbol (O)". (Appendix "A") (R. 849-50).

The facts as to competition, loss of business, and injury sustained by up-town competitors of the water-front concentrators are to be found in the testimony, hereinbefore referred to, of witnesses Neale, Steele, Harris, Reed, Tiedeman, Toombs, and Kempner.

Summing up the facts with regard to the movement through an up-town facility to shipside and the movement direct to the water-front facility for direct delivery to shipside, the testimony shows conclusively that the services involved in the inbound movement to the up-town facility on the great bulk of the cotton are substantially less than those in connection with the inbound movement to the shipside facility, and that the total of services performed in accomplishing the inbound movement to the up-town facility and the out-

bound movement from that facility to the shipside are substantially the same as, and certainly not greater than, the services rendered in connection with the direct delivery of a domestic shipment to a shipside facility.

Upon the basis of a mass of testimony, of which that referred to above is only illustrative, the Commission made the following finding:

> "Considering now the question of whether our previous finding was correct that the undue preference and prejudice should be removed by a readjustment which will result in the ship-side rates becoming higher than the city-delivery rates by no more than the wharfage charges. There is little, if any, more service performed in delivering shipments at the wharves and piers under the ship-side rates than is performed in delivering shipments at the water-front warehouses or compresses at the city-delivery rates. For illustration, at the water-front plant of the Houston Compress Company the wharf parallels the water front and immediately back of and paralleling the wharf are warehouses. There is a switch track on and extending the entire length of the wharf. There are also switch tracks alongside the warehouses. Cotton shipped from an interior warehouse, or ordered switched from an uptown warehouse under transit, for ship-side delivery upon the wharf at this facility, would be charged ship-side rates. But upon similar cotton, originating perhaps at the same point and handled in substantially the same manner by the carriers, delivered upon the side tracks serving the adjacent warehouses, the lower

city-delivery rates would be applied. In both instances the carriers would assume the cost of unloading the cotton; in the one case from the car to the wharf and in the other from the car to the receiving platform of the warehouses. Those who are striving to have us reverse our previous finding that the rates, exclusive of wharfage charged, should be equalized, contend that the carriers are put to some greater (fol. 43-a) expense in connection with the shipments delivered at ship-side because of greater free time allowances and other minor incidental services. That question was discussed in our prior report and nothing developed upon further hearing or reargument convinces us that what we there said is unsound." (R. 61-62).

The three-judge court below, after a complete review of the testimony in the record relating to the many contentions of the appellants, and after mature deliberation upon all the facts before it, affirmed that finding of the Commission in the following language:

"In short, the Court was in agreement that the up-town and the water-front facilities should be charged the same rate, in the same switching limits. They were in doubt whether that was the effect of the order. They have, after the most careful review of the able briefs of counsel, reached the conclusion that the only question for consideration is the rate established. That if that rate is the same for all persons in the same territory, that is the end of the matter. That it cannot make any legal difference whether the carrier performs the service continuously or after a

stop for concentration allowed by its tariff, or makes allowance in lieu of, but only in lieu of transportation, and *that if attention is fixed upon the movement by the carrier, the difficulties of the case will disappear.* (Italics ours). That they arise out of, and only out of, a consideration of allowance in lieu of transportation.

"That this confusion can and should be avoided by disassociating the rate from the allowances and considering each upon its own merits. That it is time enough for a shipper to complain of an allowance or a disallowance when there has been an order on it, and that the present contention is purely academic and speculative. They believe that if the water-front warehouses can have cotton delivered to their own plant facilities by which they can put the cotton to shipside, it is no concern of theirs that an up-town warehouse gets its cotton to shipside at the same transportation cost. That the fact that the water-front warehouses have spent money to get their sites, and made expenditures upon intra-plant equipment is no matter to be considered in rates. That they are entitled to as good a rate as others situated in the same limits but that there is no reason why they should have better rates." (R. 138-139).

No where in appellants' brief do we find a challenge of the correctness of this finding by the court below.

This Honorable Court has never held it to be the law that illegal discrimination and preference cannot exist except in those instances where the transportation service is identical in all minor details. On the contrary,

this Court has consistently affirmed the principle that discrimination is a question of fact to be passed upon by the Commission and that if the Commission has considered the facts with regard to the matters involved, its conclusions upon such facts are necessarily conclusive.

In *Virginian Ry. vs. U. S., 272 U. S. 658*, this Honorable Court, speaking through Mr. Justice Brandeis, stated at page 663:

> "The Virginian attacks the Commission's finding of unjust discrimination. There clearly was substantial evidence to support every fact specifically found. To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law."

See also *Western Paper Makers Chemical Co. vs. U. S., 271 U. S. 268; Interstate Commerce Commission vs. A. T. & S. F., 234 U. S. 294; Chicago Illinois & Louisville Ry. Co. vs. U. S., 270 U. S. 287; Seaboard Airline Ry. Co. vs. U. S., 254 U. S. 57; Interstate Commerce Commission vs. B. & O., 225 U. S. 326.*

This Honorable Court has also held consistently that the question as to what constitutes an undue discrimination and an undue preference or advantage is not a question of law but a question of fact. (See *Pennsylvania Co. vs. U. S., 236 U. S. 351; Nashville, Chattanooga & St. Louis Ry. Co. vs. Tennessee, 262 U. S. 318).*

It is also well established that, even if the constituent facts bearing upon the question of discrimination are undisputed, the final fact as to whether or not the evidence shows discrimination is a question to be determined by the Commission and that the conclusion of the Commission upon that question is binding on the Courts, if there was substantial evidence before the Commission supporting its finding. (See *U. S. vs. Louisville & Nashville Ry., 235 U. S. 314).* Arbitrary action and error of law result only when the Commission has refused to consider evidence or has acted without substantial evidence. *(See Baltimore & Ohio Ry. vs. U. S., 264 U. S. 258).*

In reaching the conclusions now under attack by appellants in this case, the Commission had before it evidence of the most substantial and satisfactory character. Every phase of the situation is completely and adequately covered—the competitive relationship between the contending parties, the relative services performed by the carriers, and all of the various transportation questions entering into an investigation of discrimination and preference. As a matter of fact, the record shows conclusively that, if any difference is to exist between the export and domestic rates, the for-

mer, based upon the service performed, should be less than the domestic rates.

Aside from that fact, however, this Court has never condemned a finding of discrimination by the Commission because of differences in the transportation service performed, if in fact the Commission did consider those differences. In the case of *United States vs. Pennsylvania Railway Co., 266 U. S. 191*, this Court had before it for consideration a discrimination order issued by the Commission in a case in which it was shown that, in order to remove the discrimination found to exist, either a further extension of the tracks of the carriers or an enlargement of the common use of their terminal facilities would be necessary, due to the fact that the industries against which the discrimination was found to exist were without certain switching zones. Regardless of the fact that it was shown that additional services were required in order to reach the plant of the complaining parties, this Court nevertheless held that the Commission's discrimination order was a valid exercise of the powers conferred upon it. As a matter of fact, the situation involved in that case brought into question the performance of terminal services not altogether dissimilar from those involved in one phase of the instant case, except that in the instant case the record shows that less service is involved in transporting the export commerce, as compared with the domestic commerce, whereas, in that case the record showed that additional services were performed for the complaining parties in some instances. Nevertheless, this Honorable Court approved the Commission's order

requiring the discrimination to be removed, because, taken as a whole, the services were shown to be substantially the same.

Perhaps the most interesting case, however, in which this Court has sustained a discrimination order of the Commission, is that of *United States vs. Illinois Central Ry., 263 U. S. 515.* In that case rates on lumber had been made applicable from a large blanket territory which extended from south of Jackson, Miss., to the Gulf of Mexico, approximately 230 miles, and from the Mississippi River into Alabama. From Knoxo, a point on a small independent line, 27 miles from Fernwood, the rates were 2 cents per 100 pounds higher than the rates from the group and 2 cents per 100 pounds higher than the rates from Fernwood, the junction point at which the lumber from Knoxo was delivered to the Illinois Central. The distance to the northern markets from the blanket group was in some instances less, and in other instances greater, than the distance from Knoxo. There was no question that, from some parts of the group, and particularly from the main line points of the Illinois Central, the cost of transportation was less than the cost of transportation from Knoxo situated on the branch line 27 miles from the main line of the Illinois Central. It is obvious that the service from Knoxo was greater than the service from Fernwood, but this Court, speaking through Mr. Justice Brandeis, held that the Commission might view the situation as a whole and pass upon the services performed with regard to the entire blanket and that the order requiring

the removal of discrimination was a valid exercise of the Commission's powers under the Interstate Commerce Act. At page 524 the Court stated:

> "Every factor urged by the carriers as justifying the higher rate from Knoxo appears to have been considered by the Commission. How much weight must be given to each must necessarily be left to it."

We most respectfully submit that every factor urged by the appellants in the instant case has been carefully considered by the Commission. As a matter of fact, the contentions of appellants now before this Court have twice received at the hands of the Commission most careful and detailed consideration. In the first opinion of the Commission, *100 I. C. C. 159*, the Commission summarized the evidence and the contentions of the parties in the following language:

> "The water-front facilities and the carriers contend that the transportation costs connected with the carriage of shipments to the ports under through export bills of lading are greater than those connected with domestic shipments to the ports, and that the value of the service to the shipper is greater. They state that it costs more to make out an export bill of lading than a domestic bill; that there is more telegraphing and telephoning, added messenger service, and greater free time accorded export shipments than domestic shipments. As before pointed out, however, the export rates are not confined in their application

to shipments moving on through export bills of lading, and the added elements of cost mentioned above would vary per unit of 100 pounds, dependent upon the size of the total consignment. Furthermore, the Galveston interests show that the (fol. 34) average detention of cars containing export shipments is little if any greater at that port than the average detention of cars containing domestic shipments. The record is not convincing that differences in transportation costs will justify the continuance of the present difference between the export and domestic rates. Especially is this so when it is considered that differences in transportation costs have been generally disregarded in keeping the Texas ports and industries at these ports on a rate parity." (R. 46-47).

We would direct particular attention to the similarity of the situation described in the concluding sentence of the above quotation to that involved in the case of *United States vs. Illinois Central Railway Co., supra.* In that case the rates were applicable to and from a broad blanket group, and the rates from Knoxo were made higher than the general level of rates from that blanket group. The significance of the last sentence in the above quotation is, therefore, quite important. The rates are generally made the same to all Texas ports, as stated by the Commission. In other words, we have here a large blanket adjustment as in the *Illinois Central Case*, above referred to. For instance, the domestic rate of 80 cents from Dallas, Texas, to Galveston, Texas is shown in the record before the Com-

mission to be the same as the rate from Dallas to Houston, yet the export rate from Dallas to Houston was 3.5 cents per 100 pounds higher than the domestic rate from Dallas to Galveston. It is also true that the export rate to Galveston was 3.5 cents per 100 pounds higher than the domestic rate to Galveston.

The point we desire to emphasize, however, is the fact that the Commission in its first opinion considered the evidence it had before it—the evidence which disclosed the relative transportation services performed in connection with the two classes of shipments in the instant case, exactly as it had done in the case of *United States vs. Illinois Central, supra.* The quotation above from the Commission's first opinion shows that the Commission considered the evidence introduced by these appellants with regard to the through bill of lading, the value of the service to the shipper, the question of the relative costs of export commerce and domestic commerce, and the question of free time accorded export shipments and domestic shipments. The Commission had before it all the facts, and those facts were given the most careful consideration.

Subsequent to the announcement of the original opinion by the Commission, and largely upon the petition of the appellants herein, the Commission reopened the matter for further consideration and afforded these appellants another opportunity to introduce evidence and argue their contentions. The appellants did introduce evidence upon rehearing concerning these matter and, after further hearing and re-consideration of the evi-

dence, the Commission handed down its second opinion, affirming in every particular the conclusion previously announced. *123 I. C. C. 685.* (R. 61-62).

It cannot be asserted, therefore, that the Commission's finding of discrimination was not based upon substantial evidence reflecting the relative transportation services and transportation conditions. It cannot be contended that the Commission's order was issued for the purpose of equalizing commercial conditions, when, as a matter of fact, the record shows that the Commission gave careful and detailed consideration to all of the relative items of transportation cost and transportation service, and based its finding and order upon that consideration. We feel no hesitancy, therefore, in defending the power and jurisdiction of the Commission in issuing the order here under attack. Its finding of discrimination represents a reasonable and logical conclusion of fact based upon evidence of the most satisfactory character, and its order directing the carriers to remove that discrimination was a valid and proper exercise of the powers conferred upon it by the Interstate Commerce Act.

## II.

**The Commission has power, authority, and jurisdiction to require the removal of a discrimination and prejudice by fixing the specific rate necessary to remove it.**

The issue presented to this Court with regard to the fixing of the specific rate for the removal of the dis-

crimination found to exist in this case involves two more or less distinct questions:

1. The power and authorty of the Commission under the Act to fix rates in any case of discrimination and preference, for the purpose of providing an exact method of removing the discrimination and preference.

2. The power and authority of the Commission to fix the rate in a case, such as the present, in which the carriers have specifically requested that the rate be fixed and have introduced evidence to afford the Commission a basis for fixing the exact rate necessary to remove such discrimination and preference.

Appellants admit, at page 61 of their brief, that the rail carriers, respondents in the proceedings before the Commission, had the right to establish and put into effect any rate which, in the carriers' judgment, would have been the proper rate for application to both domestic and export commerce. Appellants' argument appears to be that, if the Commission had done no more than order the discrimination removed and if, as a result of that order, the carriers had established one rate for application to both domestic and export commerce, such rate would be satisfactory to them. We most respectfully suggest that appellants are now in no different position than if the matter had been handled as suggested, for the reason that the carriers have accepted the single rate fixed by the Commission as the proper rate to apply to both domestic and export commerce, and have published it by filing it with the Interstate Commerce Commission.

In addition, the carriers have abandoned their attack upon the Commission's order fixing the rate and necessarily, therefore, have accepted such rate as satisfactory to them. The appellants are therefore left in exactly the same position they would have occupied had the carriers on their own initiative established the single rate which is now in effect. They have, therefore, the same remedy at law insofar as the reasonableness of the single rate fixed by the Commission may be concerned, as if that rate had been voluntarily established by the carriers, namely, they have their right under Sections 13 and 15 of the Act to appeal to the Commission in a proper complaint attacking the rate as unreasonable and seeking reparation for any amount paid in excess of what the Commission may find to be a reasonable rate.

The issue as to the fixing of the rate upon rehearing in these proceedings has arisen as a result of the fact that the Commission, in its first decision, in *100 I. C. C. 159*, issued an order requiring the discrimination and preference to be removed (R. 53), without prescribing the exact method for the removal of that discrimination. In that first opinion, however, the Commission stated at page 167 (R. 49).

> "The investigation did not cover the reasonableness of the rates and our findings here are not to be construed as authorizing the carriers to increase their present revenues. Rather, the rates should be so readjusted as to preserve existing revenues."

The carriers, respondents in the proceeding before the Commission, endeavored to comply with the Commission's order by fixing one rate which would, in their opinion, preserve existing revenues on both domestic and export traffic. They found, however, that, in accomplishing that purpose in the manner decided upon, they would violate an order of the Commission issued in *Docket 11965* by increasing certain rates prescribed in that case. In addition to this fact, they found the Railroad Commission of Texas unwilling to increase the Texas intrastate domestic rate and unwilling to grant the carriers authority to so increase such rates. The carriers, therefore, sought to have the Interstate Commerce Commission fix the exact rate necesary to remove the discrimination and preference, in order that they might be relieved of the outstanding order in *Docket 11965* and in order that they might be provided with the basis for a demand upon the Railroad Commission of Texas to readjust the Texas intrastate rates. The purpose of the Commission's notice for further hearing cannot be properly understood except by reference to the situation which thus made it necessary. That notice stipulated that the Commission would determine, upon rehearing, what rate should be established for the purpose of removing the discrimination and preference. The order and notice of the Commission for re-hearing did not bring in issue the reasonableness of the rates *per se;* it involved simply the question as to what readjustment, as between the domestic and export rates, would remove the dis-

crimination found to exist, without decreasing the carriers' revenues.

Proceeding first to a discussion of the carriers' request to have the exact rate fixed and the evidence submitted for that purpose, we would call attention to the circumstances surrounding this particular phase of the case. The Commission, in its first opinion, found, at page 166 of volume *100 I. C. C.* (R. 49), that the adjustment of export and domestic rates was unduly prejudicial to up-town and interior warehouses and unduly preferential of water-front warehouses, and its order simply required the carriers to remove that preference and advantage (R. 53). The method of removal was left entirely in the hands of the carriers. Thereafter, the carriers filed petitions with the Commission in which they alleged that they were unable to comply with the present order (R. 53) without violating the Commission's order in *Docket 11965, Galveston Commercial Association vs. Alabama & Vicksburg Ry. Co.*, 77 I. C. C. 338. They alleged further that they were unable to obtain permission from the Railroad Commission of Texas to readjust the Texas intrastate domestic rates so as to make the one-rate plan apply to the Texas ports.

As a result of those petitions, the Commission reopened Dockets No. 14940, 13991, and 11965, for the purpose among others, of determining "what rates shall be established to comply with our findings and order" (R. 55). That notice was served upon all parties interested in these proceedings, including the car-

riers and shippers, and specifically including the appellants, who appeared for the rehearing of the case and offered evidence for the purpose of showing what amount intermediate between the existing domestic and export rates should be established as the single rate, in order to remove the discrimination. (R. 608-618). During the course of the introduction of that evidence, counsel for the appellants stated to the Commission in the following language his understanding of the issues upon rehearing:

> "In this case the Commission has, among other things, set down for determination the question of what rates shall be established to comply with the findings that they may make in this proceeding."

The presiding examiner at the hearing inquired of counsel for appellants:

> "Do you understand that to mean between 80 cents and 83.5 cents, we will say, from Texas common points?"

To which counsel for appellants answered:

> "Yes, sir, it is our position that in no event should the one rate be such as would be higher than the 80 cent rate for the reason it would produce an unreasonably high rate. It is an issue to a limited extent in that way."

The carrier respondents clearly understood the nature of the issues upon re-hearing, and introduced extensive evidence, the purpose of which was to show what rate should be established for application to both domestic and export commerce without impairing the carriers' revenues. That testimony was presented by Witness S. G. Reed (R. 815-844); Witness Drake (R. 945 to 850); Witness E. A. O'Donnell, (R. 851-853); Witness Cummings (R. 783-813); and Witness Bowden (R. 813-815). The testimony consisted, in the main, of an analysis of the movement of cotton to the various port concentrators and a discussion of the services rendered by the carriers in making delivery to water-front facilities and to ship-side wharves. Witness S. G. Reed, referring to the evidence of the carriers on this question stated:

> "They have made an exhaustive study of the handling of the Texas cotton to the Texas Gulf ports for the season 1924-25." (R. 817).

This witness further stated:

> "The carriers desire to assist the Commission in determining what rate, if a one-rate plan is to be prescribed, is the one that will preserve their revenues." (R. 817).

The witness further stated that:

> "We are firmly of the opinion that at least an 83-cent basis is necessary to preserve these reve-

nues under a one-rate plan, and that the figures we have presented justify such a basis which we respectfully request be prescribed, if a one-rate plan is prescribed." (R. 833).

It will be recalled that the carriers in the court below attacked the Commission's final order upon the alleged basis that the rate prescribed by it was not sufficiently high to preserve the carrier's revenues. However, after the decision of the three-judge court below, that attack was abandoned. In referring to the appellants' and the carriers' contentions, the court below stated:

> "We are further of the opinion that, in view of the proceedings before the Commission, in which all parties participated under an order stating as one of the purposes of the hearing the arriving at a rate which would remove the discrimination found, petitioners having participated in that hearing without objection or contest, and the carrier plaintiffs, having in fact invoked the Commission's aid upon the point, are in no position now to seek injunctive relief against the named rate, but should, if the rate is deemed not just and reasonable per se, pursue their remedy before the Commission in appropriate proceedings available to them for that purpose." (R. 141).

We have, therefore, the following significant chronology of events to which we would request attention before proceeding to a discussion of the propositions of law here raised:

1. The appellants herein first petitioned the Commission for re-opening and reconsideration of its decision, and did not see fit in that petition to ask a hearing on the reasonableness of the rates *per se*.

2. The Commission i sued its notice, specifically setting forth as one of the issues the determination of what rate should be established for application to both domestic and export commerce in order to remove the discrimination and preference previously found to exist.

3. That notice re-opening the case was served upon appellants herein shortly after December 28, 1925.

4. The first hearing upon the re-opened case was held in Houston, Texas, April 26, 1926. Subsequent hearings were held at Dallas, Texas, and New Orleans, La. At no time did counsel for the appellants deem the question of the reasonableness of the rates *per se* of sufficient importance to file with the Commission a complaint, which might have been properly filed at any time, bringing in question the reasonableness of the rates involved under Section 1 of the Act.

5. The Commission, in its opinion on re-hearing, *123 I. C. C. 685*, gave detailed consideration to the evidence of the carriers offered for the purpose of determining the amount of the single rate under the one-rate plan (R. 64-67), and concluded that discussion of the evidence with the following statement:

"Furthermore, the above finding is without prejudice to further inquiry into the reasonableness of the above rates in connection with other cases now pending." (R. 67).

The court below used the following language in referring to the evidence upon which the Commission fixed the single rate:

"***There is ample evidence to support a finding that under the practice prevailing as to shipments to the ports a rate of 81 cents would be a just and reasonable rate to remove the discrimination existing under the two-rate plan * * *" (R. 141).

The common carriers, respondents before the Commission, are the only parties in interest who may properly maintain a suit in any court attacking the Commissions' order fixing the specific rate to remove the discrimination found to exist. It is the rights of the common carrier alone which require a hearing and the introduction of evidence to determine the validity of an order of the Commission fixing rates. The common carriers, having sought the aid of the Commission in fixing the rates, having sought the re-opening of *Docket 11965* for that purpose and having introduced evidence upon that question, apparently saw the inconsistency of their position before the court below and withdrew their attack upon that decision.

It is apparent, furthermore, that the rights and interests of the shipping public generally cannot possibly suffer injury as a result of the order of the Commission fixing the rates here involved. If the rate fixed is unreasonable, the appellant shippers here complaining have an adequate remedy under Sections 13 and 15 of the Interstate Commerce Act. They may complain to the Commission, and if the rate is found unreasonable, they may obtain reparation on past shipments and secure the establishment of a reasonable rate for the future.

A state of facts almost identical was presented to this Court in the case of *United States vs. Merchants & Manufacturers Traffic Association of Sacramento, Calif., 242 U. S. 178.* In that case the Commission had undertaken numerous investigations concerning fourth-section applications of the carriers operating lines of railway in trans-continental transportation to the Pacific Coast. In those applications certain interior western cities had been included as terminal cities and were thereby accorded lower rates than the rates applicable at intermediate points. Among those points thus accorded the benefit of the lower port rates were Sacramento, Stockton, San Jose, and Santa Clara. Upon the application of the carriers for fourth-section relief, the Commission issued orders which modified the basis of prescribing the rates and established certain zones on the Pacific Coast. The carriers made an attack upon the validity of this order, and the Commission's order was sustained in the *Inter-Mountain*

*Rate Cases (U. S. vs. A. T. & S. F., 234 U. S. 476).* Subsequent to that decision by this Court, the Commission made certain modifications of its fourth-section orders, in line with certan amendments of the Interstate Commerce Act which had become effective in the meantime. The effect of these amended fourth-section orders of the Commission was to eliminate Sacramento, Stockton, San Jose, and Santa Clara from the original applications of the carriers, thus depriving those points of the advantage of the rates applicable to the port cities. Thereupon, Sacramento and the other interior cities involved attacked the Commission's order on the ground that it had been made without according them the privilege of a hearing on the reasonableness of the rates involved, and, further, upon the ground that no justification existed for an increase in their rates. This Court, speaking through Mr. Justice Brandeis, answered that attack in the following language, which is specifically applicable to the instant case:

> "While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least, in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, Sections 13 and 15 afford ample remedy. Respondents contend that, after the amended order was entered and the tariffs filed, they did apply to the Commission for relief, 'but were de-

nied the right of a hearing', and that 'their protest and demand were ignored and denied'. What they did was to petition for a 'rehearing' in the proceedings under the 4th section, to which they now say they were not parties, instead of applying for redress under Section 13, as they had a legal right to do. *They mistook their remedy.* (Italics ours). To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged unjust discriminations might result in creating infinitely more. The decree of the district court cancels the amended order and the tariff only so far as it concerns the four complaining cities, and thereby discriminates perhaps most unjustly in their favor as against the other 181 interior cities."

It is true that the *Sacramento Case, supra,* involved action under Section 4 of that Act, relating to the long and short-haul rates; but this Court has held that the purpose of Section 4 is to prevent unjust discrimination (See *Skinner & Eddy vs. U. S., 249 U. S. 449,* at page 576). The specific holding of the court in the last-cited case was that Section 4 should not be read alone, but must be read in the light of the purpose of its enactment, which was to prevent unjust discrimination. Therefore, the decision in the *Sacramento Case, supra,* is directly in point here, for the reason that the specific matter involved was a discrimination resulting from lower rates to the more distant points and higher rates to intermediate points.

Sacramento and the other cities involved were placed upon an intermediate basis which resulted in an increase in their rates without a hearing as to the reasonableness *per se* of such rates. Upon those facts this Court held that the Commission's order was a valid exercise of power and that there was no ground for injunctive relief, because the plaintiffs before the court had an adequate remedy at law provided by Sections 13 and 15. It is clear that the appellant shippers had ample opportunity to seek and obtain a hearing upon the reasonableness *per se* of the rates involved under Section 1, and that they did not see fit to raise such issue before the Commission. It is equally clear, therefore, that the interests of the shipper in such a situation are not imperiled, the shipper having an adequate remedy if the rates be in fact unreasonable.

In the instant case, as in the *Sacramento Case*, the shipper has mistaken his remedy. The real parties in interest in the matter of fixing the rates, the common carriers, are not here complaining. In the case of *Interstate Commerce Commission vs. Chicago, Rock Island & Pacific, 218 U. S. 88*, at page 108, this Court stated:

> "We have said several times that we will not listen to a party who complains of a grievance which is not his."

Appellants' brief herein, particularly at pages 52 to 62, together with the cases there cited, show clearly

that appellants are before this Court with a complaint based entirely upon an alleged violation of the rights of the carriers, who are not here complaining The cases there cited, in some instances, actually deal with confiscation of the carriers' property and the violation of the carriers' constitutional right to a hearing.

Furthermore, the statutes confer authority upon the Commission in plain and unambiguous terms, to fix just and reasonable rates for the purpose of removing discrimination. We quote the pertinent part of Section 15, paragraph 1:

> "That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what

will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

We respectfully request particular attention to the fact that "whenever * * the Commission shall be of the opinion that any * * rate * * is or will be * * unjust, discriminatory, or unduly preferential or prejudicial * * the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rates * * *thereafter to be observed in such cases*" (Italics ours). It is to be observed that Section 15, paragraph 1, provides that the Commission may prescribe a just and reasonable rate where the rates are found either unreasonable or dis-

criminatory and preferential. The use of the disjunctive "or" indicates clearly that the Commission may, in either case,—where the rates are found unreasonable or where the rates are found merely discriminatory and preferential,—prescribe a just and reasonable rate for the purpose of correcting the unreasonableness or for the purpose of removing the discrimination and preference. Such is the only reasonable interpretation of the language employed, and such was the suggested interpretation placed upon the statute in the case of *O'Keefe vs. U. S., 240 U. S. 294.* Such was also the view of the three-judge court below in the instant case. We quote from the opinion of the court below:

> "The full Court is, however, of the opinion that a fair construction of the words 'just and reasonable' as used in the context above quoted, permits the conclusion that in a discrimination case under Section 3 such as this is, it is only necessary that the rate fixed upon to remove the discrimination be found to be just and reasonable for that purpose, and that it is not necessary that it be found just and reasonable per se." (R. 140).

In conclusion under this heading, we most respectfully submit that the real party at interest is not now complaining before the Court; that the appellants have an adequate remedy for injuries sustained as a result of any rates involved in this proceeding which may be unreasonable, and, further, that the Commission was

and is empowered under Section 15, paragraph 1, of the Interstate Commerce Act to prescribe a just and reasonable rate for the purpose of removing a discrimination and preference previously found to exist. Especially is this true in the instant case, where the Commission had an outstanding order fixing just and reasonable rates which necessarily had to be amended in order to permit compliance with its subsequent order requiring the removal of the discrimination and preference found to exist in the instant case. Furthermore, we would emphasize the fact that the fixing of the rate by the Commission in this case was in response to a specific request from the carriers, for which purpose the carriers submitted evidence at the hearing. The appellants now before this Court participated in those hearings, and have not yet attempted to bring in issue before the Commission the reasonableness *per se* of the rates here involved or to obtain redress for any excess payments which they may conceive themselves to be making under the readjusted rates.

## III.

**The Commission's order relates in no way to allowances made by the carriers to any shipper. The question involved as to allowances is a matter of tariff interpretation.**

In the first opinion by the Commission in this case, *100 I. C. C. 159*, at page 167, the Commission stated:

"This finding is not to be construed as condemning the practice of the carriers of absorbing drayage charges in lieu of switching." (R. 49).

In the second opinion of the Commission, *123 I. C. C. 685*, at page 696, with regard to this matter the Commission stated:

"In our prior report we referred to the fact that in order to conserve cars for line-haul movements, and as an aid in preventing terminal congestion during periods of heavy (fol. 47) traffic, respondents make allowances to shippers who, in lieu of switching, dray their cotton from the uptown warehouses and compresses to shipside, and said that we saw no reason for disturbing that practice. The allowances are made only on cotton which respondents are under obligation to transport to shipside under transit arrangements. The water-front facilities now contend that, if the city delivery and shipside rates are to be equalized, respondents should be required either to discontinue the drayage allowances or make allowances for handling cotton from the water-front warehouses to shipside. Respondents ask us to determine whether such allowances may be made at the water-front facilities, and if they may be made what they should be. Upon the present record we see no reason for condemning reasonable allowances for drayage from the uptown facilities under the circumstances recited above, such drayage being a substitute for rail transportation. But such allowances must not be more than reasonable considering the benefit to respondents flowing

from such substitute service, and must not be used as a cloak for unlawful preference to shippers furnishing such substitute service. Not all of the cotton handled by the water-front facilities is delivered to shipside at adjacent wharves or piers, and as to such cotton of the character referred to above as is delivered to ships at other wharves or piers, the water-front facilities occupy no different position from that of the uptown facilities, and upon such cotton respondents may properly make reasonable drayage allowances under similar circumstances. This applies equally to barging where barging is used as a substitute for switching. But upon cotton delivered to shipside from water-front warehouses or compresses over adjacent wharves or piers operated as a part of or in conjunction with such warehouses or compresses a different condition exists. The hand or electric trucking, or movement by overhead trolley, from the part of the water (fol. 47-a) front facility known as the warehouse or compress to that part known as the wharf is not a substitute for rail transportation, but is an intraplant movement just the same as the handling of cotton from the interior or an up-town warehouse to the railroad car or dray is an intraplant movement. No allowances may lawfully be made for these intraplant movements." (R. 67-68).

It should be observed that the Commission, in both opinions, referred to the matter of allowances as an existing practice of the carriers, and commented on the obligation of the carriers under existing transit privileges to perform additional transportation service

At page 66 of the appellants' brief it is conceded that the obligation to perform the additional transportation service is a part of the carriers undertaking provided for in the *tariffs*. The facts are that such provisions have been published in the tariffs for many years. Such being the case, it is clear that appellants are in error in stating that the Commission's order requires the carriers to make allowances to any shipper or to cease and desist from making allowances to any shipper. The facts are that the existing tariffs establish a transit privilege at up-town facilities and at all facilities where additional rail transportation is necesary to reach shipside. Under that transit privilege, the carriers are required by the provisions of their tariffs, legally on file with the Commission, to refund to the shipper certain specific amounts, not to exceed 20 cents per bale, when the shipper performs the transportation service which is required of the carrier under the transit privilege. Whether or not appellants are entitled to such allowances is purely a matter of the interpretation of the terms of existing tariffs on file with the Commission, and when the Commission dealt with the question in its report in this case, it was dealing solely with a question of tariff interpretation. If appellants deem themselves aggrieved by the interpretation thus placed by the carriers and by the Commission on this long-established provision of the tariffs, they have their remedy in the form of a direct action in the courts to recover any amounts which they conceive to be due them. *Great Northern vs. Merchants Elevator Co., 259*

*U. S. 285; Turner, Dennis & Lowrey vs. Chicago, Milwaukee & St. Paul, 271 U. S. 259.*

It should be observed, also, as the record affirmatively shows, that, where additional rail transportation is necessary from a water-front facility to reach shipside, the existing transit privileges and the allowances thereunder are applicable to the business of the appellants, and 70 per cent of the appellants' busines is so handled. (R. 297). 30 per cent of the business of the appellants is delivered direct to ship from appellants' facility by the intra-plant handling of the cotton, as shown by Appendix "B" herein. The expression of the Commission with regard to the impropriety under the tariffs of granting allowances to the water-front facilities for intra-plant services performed by them relates to that 30 per cent of the business. The order of the Commission, however, did not direct the carriers to make an allowance to anyone and did not order the carriers to cancel an existing allowance accruing to any shipper under existing tariffs. The expression from the Commission's second opinion dealing with the question of allowances, quoted in full above, is nothing more than an interpretation of existing tariff provisions and is a correct interpretation of such provisions, as the facts in the instant case clearly show.

The facts show that the service in question is an intra-plant service which it is not the duty of the carriers to perform and which the water-front facilities cannot in fact permit the carriers to perform. The con-

tention that the water-front facilities should have an allowance for this service was advanced by counsel for the Houston Compress Company, and most of the testimony in the record related to that company's Long Reach plant. At that plant an overhead trolley or conveyor system is in operation. It is indicated on the blue print, Exhibit A-33 (Appendix "B") by broken lines. It runs through the 10 warehouse compartments, through the press room, along the receiving platform at the rear of the main warehouse, to and through the one-story warehouse to the rear of the main warehouse, and out to, and along, the entire length of the wharf. This trolley system, as the evidence shows, provides an efficient and economical method of moving cotton from place to place in the plant.

Inbound cars of cotton consigned to the plant are placed by the carrier on the switch track running alongside the receiving platform at the rear of the main warehouse. The bales are unloaded from the cars to the platform by hand trucks. The bales are first weighed, then samples are taken from each and sent to the sampling room. (R. 489). The cotton is held on the platform until the samples have been examined and classed, and the class indicated on the tags. (R. 469). Then the cotton is put on the trolley and trolleyed to the press room, where it is pressed to high density and patched. (R. 469). It is then sent to a segregating room (compartment No. 1), and is segregated according to grade. (R. 469). It is then loaded on the trolley and trolleyed to storage space in va-

rious parts of the warehouse, wherever there is room. (R. 464).

Outbound cotton, for loading on ships docked at the wharf of the plant, is trolleyed from the warehouse to the space on the wharf designated as the ship's berth. (R. 465-469). See blue print Exhibit A-33 (Appendix "B"), which shows the spaces designated on the wharf as ships' berths, that is, berths Nos. 1, 2, 3, and 4. Sometimes hand trucks are used to move the cotton from a compartment of the warehouse to the wharf. For example, if a bale of cotton located in compartment No. 3 opposite the door leading to berth No. 2 is to be moved to berth No. 2, it would be hand-trucked. (R. 476). To illustrate how close this warehouse is to the water's edge, attention is called to the testimony of Mr. Scott that the trolley in compartment No. 3 is only 50 to 55 feet from berth No. 2. (R. 476).

When the complete cargo of a particular ship has been placed on the wharf in the space designated as the ship's berth, the ship will issue a bill of lading, and becomes responsible for the cotton. The loading of the ship is performed by the ship's labor.

On the outbound shipments by railroad the same procedure is followed; the cotton is put on the trolley in the compartment where it has been stored and is trolleyed to the platform where the cars are spotted. (R. 469-473).

Unloading of inbound rail shipments of cotton from cars to warehouse is paid for by the carriers. Loading

of the outbound cotton from the ship's berth into the hold of the ship is paid for by the ship. It is obvious, therefore, that the allowance from the railroad which appellants would claim is an allowance for the service of moving the cotton from the storage compartments of the warehouse to the ship's berth on the wharf. And the evidence is indisputable that this service is performed by the overhead trolley system of the plant, and is identically the same service as that performed in placing the other 70 per cent of the cotton in position to be loaded onto the railroad cars. The trolley system is in operation at all times (R. 474), performing various movements necessary in the operation of the plant, and, in every phase of its operations, performs a service which is distinctly intra-plant in character. Furthermore, it is established beyond dispute that the service thus performed could not possibly be performed by the carriers. The testimony of the officials of the plant demonstrates that fact. Witness Scott, Vice-President and General Manager of the Houston Compress Company testified in regard to that question:

> "We do not permit the employees of the steamship company to come into Compartments 1, 2, 3, 4, to 10, shown on Exhibit A-33, to pick up cotton and take it into berths 1, 2, 3, and 4. We do not permit anybody to go into any of our compartments (R. 1369). We would not permit railroad employees to come into storage spaces 1 to 10 and take cotton and put it in berths 1 to 4. We insist on doing that ourselves. I am General Manager of the Compress Company, which includes berth

spaces 1, 2, 3, and 4, as well as other parts of the facility." (R. 470).

A detailed description of the trolley system and of the method of handling cotton in that plant was given by Witness Scott, record pp. 475 to 478, inclusive.

The above testimony shows that the Long Reach plant must necessarily perform for itself the service of moving the cotton from the storage compartments of its warehouse to the ship's berth. The service, therefore, is obviously an intra-plant service which the railroads are under no duty to perform, and which the railroads could not perform, and there is absolutely no basis for the claim that the railroad should pay for such service.

Counsel contend at page 66 of their brief, that at the Long Reach plant (the floor plan of which is depicted by Appendix "B") the cotton could be switched from track No. 2 opposite the rear platform of the warehouse out to the main line and thence around to the wharf track No. 1. At page 66, counsel states that the carrier is under a tariff obligation to perform this service. As a matter of fact, however, the warehouse company does not not want its cotton handled in that way and has made no demand upon the carrier to perform that service. Witness Scott testified at pages 475-6 of the record:

> "The trolley operation would be cheaper than loading it onto cars and having it switched, and a larger volume could be handled."

Therefore, as the witness states, because of the volume of cotton handled, it could not be moved to the wharf in railroad cars, and the company prefers to move it to its wharf by trolley. The appellants, therefore stand in the position of demanding that the carriers make an allowance for a service which they do not desire and which, according to their own admission, would not be actually performed by the rail carriers under any circumstances.

The facts are conclusive to the effect that the services performed by the water-front facility in breaking the cotton out of storage Compartments 1 to 10, Appendix "B", and moving it to the wharves marked 1, 2, 3, and 4 on Appendix "B", constitute what is purely an intra-plant movement of the traffic. As such, that service could not possibly be performed by the carriers, and could not possibly be any part of the service which the carriers' existing tariffs obligate them to perform. They are services of identically the same character as the intra-plant services performed at the up-town facilities and the interior facilities in breaking the cotton out of storage and loading onto drays for transportation to the waterfront, in lieu of such switching. (R. 735).

It is obvious that, if an allowance were made to the appellants herein for the performance of such intra-plant services, the other shippers under the law would be entitled to a similar allowance. Interior shippers, for instance, would be entitled to an allowance to cover the cost of breaking the cotton out of storage

and loading it into box-cars. The ultimate result would be that the appellants' position would be the same as it is today.

In connection with this matter of allowances, it should be borne in mind that an interior shipper, shipping on a through bill of lading or on a bill of lading marked for export, receives no allowance for drayage, because none is performed. His cotton is loaded in carload lots at an interior point and is transported direct to shipside and delivered upon Track No. 1, Appendix "B", the carrier absorbing the cost of unloading and placing in ship's berth. Domestic cotton from an interior point going to appellants' plant (Appendix "B", would be delivered on Tracks 2 and 3, and the carrier would absorb the cost of unloading. The service of moving the cotton after unloading and storage in Compartments 1 to 10 (Appendix "B") to the wharves 1, 2, 3, and 4 (Appendix "B"), is purely an intra-plant service of the water-front concentrator similar to the nitra-plant service of the interior concentrator in breaking his cotton out of a storage house and loading it into outbound box-cars.

The performance of an intraplant service by the appellants is of no benefit to the common carrier, but on the contrary is performed for appellants' own benefit and convenience. The carrier does not receive the same benefit from this intraplant service as it receives in connection with the drayage performed by the uptown and back-of-the-water-front facilities. Therefore, the facts of this case show that the shipper is not per-

forming a transportation service for which it would be entitled to an allowance, as set forth by this Court in *Union Pacific Railway Company vs. Updike Grain Co., 222 U. S. 215,* at page 220, where the court stated:

> "The carriers cannot pay one shipper for transportation service, and enforce an arbitrary rule which deprives another of compensation *for similar service.* To receive the benefit of such work by one elevator without making compensation therefor would, in effect, be the involuntary payment by such elevator of a rebate to the railroad company, for it would enable the railroad to receive more net freight on its grain than was received from its competitor located on the railroad's track. This cannot be directly done, nor indirectly by means of regulation." (Italics ours).

The significant thing in connection with the above quotation is that this Court has held that in order to obtain the allowance the service performed by the shipper must be a service similar to that performed by other shippers. There can be no dispute in the instant case that the service performed by the appellants is not similar to the service performed by other shippers, for the reason that, in those instances where the appellants performed a similar service, the Commission has correctly interpreted the tariffs to entitle appellants to the allowance. At page 196 of *Vol. 128, I. C. C.,* the Commission stated:

> "Not all of the cotton handled by the water-front facilities is delivered to shipside at adjacent

wharves or piers, and as to such cotton of the character referred to above as is delivered to ships at other wharves or piers, the water-front facilities occupy no different position from that of the uptown facilities, and upon such cotton respondents may properly make reasonable drayage allowances under similar circumstances."

It is obvious, therefore, that the Commission's interpretation of the tariff in the second opinion at the request of the carrier respondents is a correct and lawful interpretation of an existing tariff provision, for the reason that it holds that where the appellants have performed a service similar to that rendered by other shippers they are entitled to the allowances made to other shippers under the existing tariffs. If appellants question the correctness of this tariff interpretation, their remedy certainly is not an attack upon an order of the Commission which relates to another matter, but, as shown by *Union Pacific Railway vs. Updike Grain Co., supra*, they have an adequate remedy in the form of a suit at law in the courts for such allowances as the carriers have failed or refused to make in accordance with existing tariffs on file with the Commission.

This Court has had occasion to hold that an allowance to the shipper must be for transportation services. In the case of *Lehigh Valley Ry. vs. U. S., 243 U. S. 444*, at page 446, the Court stated:

"It is true, no doubt, that George W. Sheldon & Company in the performance of the services for

which it is paid, maintains offices here and abroad, advertises the railroad, solicits traffic for it, does various other useful things, and, in short, we assume, benefits the road and earns its money, if it were allowable to earn money in that way. It is true also that in *Interstate Commerce Commission vs. F. H. Peavey & Company, 222 U. S. 42, 46 L. Ed. 83, 32 S. Ct. R. 22*, an owner of property transported was held entitled, under section 15 of the act to regulate commerce, to an allowance for furnishing a part of the transportation that the carrier was bound to furnish. * * * The services rendered by George W. Sheldon & Company, although in a practical sense connected with such transportation, were not connected with it as a necessary part of the carriage—were not transportation service in the language of *Union Pacific Railroad Company vs. Updike Grain, 222 U. S. 215.*"

In the case of *United States vs. Baltimore & Ohio Ry. Co., 231 U. S. 274*, this Court held invalid an order of the Interstate Commerce Commission requiring the carrier to make an allowance to the Federal Sugar Refining Co. for the cost of transporting sugar from its plants ten miles beyond the lighterage zone. The allowance had been granted to Arbuckle Bros., a shipper whose plant was within the lighterage zones. The Commission's order required the carriers to make an allowance to the Federal Sugar Refining Co., whose plant was ten miles beyond the lighterage zone. This Court held that the allowance to Arbuckle Bros. was an allowance to cover transportation service which the

carrier was obligated to perform under its existing tariffs, that the service from the Federal Company was not service that the carrier was obligated to perform, and that the carriers could not lawfully make allowances to shippers for purely accessorial services not in connection with, or in aid of, transportation. Such is clearly the intent and purpose of the Interstate Commerce Act with regard to allowances. Section 15, paragraph 13, of that Act provides that:

> "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

It should be noted that the Act contemplates allowances only where the shipper renders a service "connected with such transportation" or furnishes an instrumentality "used therein". Appellants' testimony in the instant case shows that the service rendered by the appallants is a service for appellants' own convenience, and that it is not in any way connected with the

service which the carrier could perform in moving the cotton from the adjacent warehouse to the connecting wharves.

The court below, upon mature consideration of the question of allowances, and after the filing of exhaustive briefs by all parties, disposed of the matter in the following language:

> "That it is time enough for a shipper to complain of an allowance or a disallowance when there has been an order on it, and that the present contention is purely academic and speculative." (R. 138).

The movements of the carrier are illustrated by Appendix "A" herein. Considering first the respective movements from the up-town facilities and the water-front facilities, we see that the cotton moves into the up-town facility in the vicinity of symbols (F), (G), and (H), (Appendix "A"), is there delivered into the possession of the shipper, and after concentration and merchandising, is moved to shipside. That movement to shipside the carrier, under its transit tariffs, must perform or pay for. It is obvious that additional rail transportation is necessary for that purpose. To cover the cost of that additional rail transportation, the carrier makes an allowance to the falicity. In the case of a direct movement to the water-front, cotton comes into the yards, symbol (5), (Appendix "A"), moves to the yard at symbol (O), (Appendix "A"), and receives at that time the additional service to the water-

front for which the allowance is made in the case of concentration at the up-town facilities. In other words, the water-front facility receives from the common carrier, in connection with the inbound movement, all of the transportation service that is ever performed, and/or paid for, by the carrier in moving the cotton inbound to up-town facility and outbound from that facility to the water-front.

Furthermore, no question has been raised in these proceedings with regard to allowances made in connection with through bills of lading and export bills of lading covering cotton concentrated at interior points. A car of through-bill-of-lading cotton will move into the yard shown at symbol (5), (Appendix "A"), along with another car of cotton consigned to the appellants, and both cars will move direct to water-front at the same facility shown at symbol (P); one car will be delivered to Track No. 1, (Appendix "B"), the other car of domestic freight will be delivered at Tracks Nos. 2 and 3, (Appendix "B"). No allowance is made to the interior shipper and the service is not greater in reaching shipside than the service in reaching a water-front facility located at shipside. On the contrary, the facts already referred to herein show the service is less in connection with the through-bill-of-lading cotton than the service in connection with either character of cotton concentrated at the port, water-front or back-of-the-water-front.

In conclusion under this heading, we most respectfully submit that the Commissions' order does not

relate to allowances and that, therefore, the question is not before this Court for consideration (See *Proctor & Gamble vs. U. S., 225 U. S. 282; Manufacturers Railway Company vs. U. S. 246 U. S., 457; United States vs. Los Angeles, 272 U. S. 299.* In addition to this fact, the tariff provisions under which shippers are today receiving allowances, are lawfully on file with the Interstate Commerce Commission. Appellants have an adequate and complete remedy at law, if they believe those tariff provisions have been misinterpreted. That they have not sought relief through such remedy clearly indicates that they do not question the correctness of the Commission's interpretation of those tariff provisions in its second opinion in this cause.

## IV.

**The Commission's order is not based upon commercial conditions and does not deprive the appellants of any transportation advantage resulting from the location of appellants' facilities. The sole effect of the Commission's order is to require the removal of an unjust preference and advantage.**

Appellants attacked the order of the Commission upon the ground that such order has the effect of depriving appellants' facilities of certain advantages of location, and they seek to invoke the principle that the Commission has no power to equalize natural advantages as between different shippers. We gather from appellants' brief, page 79, that the advantage of which

they are alleged to be deprived and which they assert should be recognized as a matter of law, is an advantage which exists by reason of the fact that no additional rail transportation is necessary to move to ship-side cotton which is stored in their facilities. Appellants state the character of that advantage in the following language:

> "But the reason the appellants have no such expense is simply that they do not ask that extra service of the carriers and they do not ask it because, by reason of their location in proximity to the ocean carriers, they do not need it."

It is obvious from the facts hereinbefore referred to that appellants do not need the additional service after concentration in their warehouses *simply and solely because they have alreday received those services prior to the delivery of the cotton to their facilities.* In other words, appellants demand and receive all of the services from the common carriers that are rendered in connection with through-bill-of-lading cotton concentrated at interior points and cotton concentrated at up-town facilities . As shown by Appendix "A" herein, the cotton of appellants receives the same service after it reaches symbol (5) as that received by the cotton of the up-town facility and by the interior facility or interior shipper. The only difference is that the transportation service is performed for the water-front man prior to concentration, whereas, it is per-

formed for the interior man and the up-town facility at the port subsequent to concentration.

Appellants have made no effort to reconcile their statement on page 79 to the effect that, because of their proximity to the ocean carriers, they do not need the additional transportation to reach shipside, with the proposition advanced before this Court that they are entitled to an allowance in lieu of transportation. Proposition 3, pages 62 to 70 of the appellants' brief, is devoted to an effort to show that appellants are entitled in law to an allowance for the performance of additional rail transportation. On page 70 of the appellants' brief, they make the unqualified statement that they do not need additional rail transportation. Appellants demand and obtain the rail transportation to shipside, in the first instant, and then endeavor to set up as a natural advantage the fact that it is not necessary to perform further services in order to place the cotton at shipside.

An advantage of location which the law contemplates shall be recognized in rate adjustments must be such as will lessen the cost to the carriers of performing the service. In the instant case, the water-front facility demands the service of the carrier in making delivery, in the first instance, to his facility, in exactly the same manner as the interior shipper and the back-of-the-water-front facility. The transportation service performed in reaching Tracks Nos. 2 and 3 (Appendix "B") is not less than that performed in reaching Track

No. 1 (Appendix "B") of the same facility. As a matter of fact, the record shows that shipside cotton has been, and frequently is, delivered on the same track as domestic cotton. (Witness O. J. Brown, Record 527).

It is inconceivable that there could possibly be any difference from a transportation standpoint between movements of domestic cotton, on the one hand, and export cotton, on the other, to Tracks Nos. 1, 2, and 3 of the facility depicted by Appendix "B". Appellants have failed to refer to any differences, except that it is asserted on page 70 that their cotton does not need additional rail transportation to reach shipside. It is obvious that a car of through-bill-of-lading cotton moving to Track No. 1 (Appendix "B") is no more in need of additional rail transportation to reach shipside than the domestic cotton of appellants.

It is submitted that appellants' facilities are so located as to create a positive disadvantage from a transportation standpoint. A glance at Appendix "A" herein for the purpose of ascertaining the location of appellants facilities, symbol (P), with reference to the carriers' yards and outbound line-haul rails indicates that, as to the 70 per cent of cotton which is not delivered to adjacent wharves for shipside delivery, appellants must necessarily require of the carriers additional outbound transportation over and above the transportation service demanded by all other cotton concentrators. Such cotton must be moved from appellants' facility through the terminals for some five, six, or seven miles

in order to reach the outbound rails for the outbound movement to destinations other than shipside. It is also true that appellants' facilities are located adversely from a transportation standpoint in connection with cotton delivered to shipside at any facility other than the one operated by them, for the reason that the carrier would perform in the first instance the service it performs for the up-town concentrators in reaching shipside, and would thereafter perform for the appellants additional transportation in moving the cotton to other shipside wharves. Appellants' location, therefore, is clearly disadvantageous as to 70 per cent of the cotton handled (R. 286), and as to the other 30 per cent the carriers perform for the appellants all of the service they perform for any other cotton concentrator.

It is submitted, therefore, that the Commission's finding of undue preference and advantage in the instant case is predicated upon the relative transportation services performed and that such finding is in no way based upon the relative commercial position of any of the contesting parties in this proceeding.

## CONCLUSION

In conclusion, we most respectfully submit that the Commission had ample power, authority, and jurisdiction, upon the record before it, to require the carriers to remove the preference and discrimination found to exist, and that the Commission, in view of the request

of the carriers to prescribe the exact rate necessary to remove that discrimination, was authorized by law to fix a just and reasonable rate for that purpose without considering its reasonableness *per se* under Section 1. It is further submitted that the appellants have an adequate remedy for the collection of reparation if they have, in any instance, paid an unreasonable rate, and that their complaint in the instant case with regard to the method of procedure followed by the Commission is incompetent to raise even a technical objection to the Commission's action.

We submit, further, that the question of allowances was not affected by the Commission's order, and, consequently, is not involved in this case, and that the Commission's expressions with regard thereto relate solely to a question of tariff interpretation and were not incorporated into the formal order of the Commission. We submit, further, that the Commission's order was not based upon commerccial conditions and that the appellants have not in fact any transportation advantage over their competitors which is recognized in law as justifying a preference and advantage.

We submit, further, that the two carefully considered opinions of the Commission embody a correct analysis of the facts and a correct and proper interpretation of the law. We submit, further, that the decision of the court below, announced after mature and extensive investigation, is based upon correct and proper findings

of fact and a correct interpretation of the law in the light of those facts. The decision below should be affirmed and the case dismissed, and it is so prayed.

Respectfully submitted,

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